

I.L.DE LOLME.

Sublish'd as the At directs July 6. 1784 by G. Robinson & S. Murray



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#### CONSTITUTION

O F

### ENGLAND;

OR

#### AN ACCOUNT

OF THE

#### ENGLISH GOVERNMENT;

In which it is compared, both with the REPUBLICAN Form of GOVERNMENT, and the other Monarchies in Europe.

### By J. L. DE LOLME, Advocate,

Member of the Council of the Two Hundred in the Republic of Geneva.

#### A NEW EDITION, CORRECTED.

Ponderibus librata suis — Oven. Met. L. I. 13.

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1796.



# K I N G.

SIRE,

THE approbation with which the Public have been pleafed to favor this Work, together with the nature of the subject, embolden me to lay the present fourth and enlarged edition of the same at your Majesty's feet, both as an homage, and an expression of the desire I entertain, the Book may for a few minutes engage the attention of a person of your deep and extensive knowledge.

Your Majesty's reign has, for many years past, afforded proofs in more respects than one, that, though human wisdom may not always be able to anticipiate difficulties, yet, affisted by fortitude, it can

A 2 fucceed

#### DEDICATION.

fucceed in terminating them in a more favourable manner than it feemed at first possible to be expected, or even in bringing them to an happy iffue. According to the common course of Nature, your Majesty. has only yet feen the less considerable part of the years of which your reign is to be composed: that the part which now opens before your Majesty, may be attended with a degree of fatisfaction proportionate to your Majesty's public and private virtues, to your difinterested government, and religious regard for your royal engagements, is the fond hope of

Your Majesty's

Most humble and

Most devoted Servant,

And these many Years

Subject by Choice,

May, 1784.

Decont!

J. L. DE LOLME,

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#### ADVERTISEMENT.

THE Book on the English Constitution, of which a new Edition is here offered to the Public, was first written in French, and published in Holland. Several persons have asked me the question, how I came to think of treating of such a subject? One of the first things in this Country, that engages the attention of a Stranger who is in the habit of observing the objects before him, is the peculiarity of its Government: I had moreover been lately a witness of the broils which had for some time prevailed in the Republic in which I was born, and of the revolution by which they were terminated. Scenes of that kind, in a State which, though fmall, is independent, and contains within itself the principles of its motions, had naturally given me fome competent infight into the first real principles of Governments: owing to this circumstance, and perhaps also to some moderate share of natural abilities,

lities, I was enabled to perform the task I had undertaken, with tolerable success. I was twenty-feven years old when I first came to this Country: after having been in it only a year, I began to write my work, which I published about nine months afterwards: and have since been surprised to find that I had committed so few errors of a certain kind: I certainly was fortunate in avoiding to enter deeply into those articles with which I was not sufficiently acquainted.

The Book met with rather a favourable reception on the Continent; feveral fuccessive Editions having been made of it. n d it also met here with approbation, even from Men of opposite parties; which, in this Country was no small luck for a Book on fystematical politics. Allowing that there was fome connection and clearness, as well as novelty, in the arguments, I think the work was of some peculiar utility, if the epoch at which it was published is considered: which was, though without any defign from me, at the time when the disputes with the Colonies were beginning to take a serious turn, both here and in America. A work which contained a specious, if not thoroughly true, confutation of those political notions by the help of which a difunion of the Empire was endeavoured to be promoted (which confutation was moreover noticed by Men in the highest places) should have procured to the Author some fort of real encouragement; at least the publication of it should 1-

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not have drawn him into any inconvenient fituation. When my enlarged English Edition was ready for the press, had I acquainted Ministers that I was preparing to boil my tea-kettle with it. for want of being able conveniently to afford the expence of printing it, I do not pretend to fav what their answer would have been; but I am firmly of opinion, that, had the like arguments in favour of the existing Government of this Country, against republican principles, been shewn to Charles the First, or his Ministers, at a certain period of his reign, they would have very willingly defrayed the expences of the publication.-In defect of encouragement from Great Men (and even from Bookfellers), I had recourfe to a subscription; and my having expected any fuecess from such a plan, shews that my knowledge of this Country was at that time but very incomplete .

After

In regard to two Subscribers in particular, I was, I confess, sadly disappointed.—Though all the Booksellers in London had at first refused to have any thing to do with my English Edition (notwithstanding the French Work was extremely well known), yet, soon after I had thought of the expedient of a Subscription, I found that two of them, who are both living, had begun a translation, on the recommendation, as they told me, of a noble Lord, whom they named, who had, till a few years before, filled one of the highest offices under the Crown. I paid them ten pounds, in order to engage them to drop their undertaking, about which I understood they already had been at

A 2 forme

After mentioning the advantages with which my Work has not been favoured, it is however just

fome expence. Had the Noble Lord in question favoured me with his subscription, I would have celebrated the generosity and muniscence of my Patron; but as he did not think proper so to do, I shall only observe that his recommending my Work to a Bookseller, cost me ten pounds.

At the time the above subscription for my English Edition was advertifing, a copy of the French Work was asked of me for a Noble Earl, then invested with a high office in the State; none being at that time to be found at any Bookfeller's in London. I gave the only copy I had (the consequence was, that I was obliged to borrow one, to make my English Edition from): and I added, that I hoped his Lordship would honour me with his subscription. However, my hopes were here again confounded. As a gentleman, who continues to fill an important office under the Crown, accidentally informed me about a year afterwards, that the Noble Lord here alluded to, had lent him my French work, I had no doubt left that the copy I had delivered, had reached his Lordship's hand; I therefore prefumed to remind him by a letter that the Book in question had never been paid for; at the same time apologifing for such liberty from the circumstances in which my late English Edition had been published, which did not allow me to lose one copy. I must do his Lordship (who is moreover a Knight of the Garter) the justice to acknowledge, that no later than a week afterwards, he fent two half crowns for me to a Bookseller's in Fleet-street. A Lady brought them in a coach, who took a receipt. As she

just I should give an account of those by which it has been attended. In the first place, as is above faid, Men of high rank have condescended to give their approbation to it; and I take this opportunity of returning them my most humble acknowledgments. In the fecond place, after the difficulties by which the publication of the Book had been attended and followed, were overcome, I began to share with Booksellers in the profits arifing from the fale of it. These profits I indeed thought to be but fcanty and flow: but then I confidered this was no more than the common complaint made by every Trader in regard to his gain, as well as by every Great Man in regard to his emoluments and his penfions. After a course of some years, the net balance formed by the profits in question, amounted to a certain fum, proportioned to the bigness of the performance. And, in fine, I must add to the -account of the many favours I have received, that

was, by the Bookseller's account, a fine Lady, though not a Peeress, it gave me much concern that I was not present to deliver the receipt to her myself.

At the same time I mention the noble Earl's great punctuality, I think I may be allowed to say a word of my own merits. I waited, before I presumed to trouble his Lordship, till I was informed that a pension of four thousand pounds was settled upon him (I could have wished much my own Creditors, had, about that time, shewn the like tenderness to me), and I moreover gave him time to receive the first quarter.

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I was allowed to carry on the above bufiness of felling my book, without any objection being formed against me from my not having served a regular apprenticeship and without being molested by the Inquisition——Several Authors have chosen to relate, in Writings published after death, the personal advantages by which their performances had been followed: as for me, I have thought otherwise; and, fearing that during the latter part of my life I may be otherwise engaged, I have preferred to write now the account of my fuccesses in this Country, and to fee it printed while I am yet living.

I shall add to the above narrative (whatever the Reader may be pleased to think of it) a few observations of rather a more ferious kind, for the fake of those persons who, judging themselves to be posfeffed of abilities, find they are neglected by those having it in their power to do them occasional fervices, and fuffer themselves to be mortified by it. To hope that men will in earnest assist in setting forth the mental qualifications of others, is an expectation which, generally speaking, must needs be disappointed, To procure one's notions, and opinions to be attended to, and approved, by the circle of one's acquaintance, is the universal wish of Mankind. To diffuse these notions farther, to numerous Parts of the Public, by means of the press or by others, becomes an object of real ambition: nor is this ambition always proportioned to the real abilities of those who feel it: very far from it. When the

the approbation of Mankind is in question, all perfons, whatever their different ranks may be, consider themselves as being engaged in the same career: they look upon themselves as being candidates for the very same kind of advantage: high and low, all are in that respect in a state of primæval equality; nor are those who are likely to obtain some prize, to expect much savour from the others.

This defire of having their ideas communicated to, and approved by, the Public, was very prevalent among the Great Men of the Roman Commonwealth, and afterwards with the Roman Emperors; however imperfect the means of obtaining these ends might be in those days, compared with those which are used in our's. The same defire has been equally remarkable among modern European kings, not to fpeak of other parts of the World; and a long catalogue of Royal authors may be produced. Ministers, especially after having lost their places, have shewn no less inclination than their Masters, to convince Mankind of the reality of their knowledge. Noble Persons, of all denominations, have increased the catalogue. And to speak of the Country in which we are, there is, it feems, no good reason to make any exception in regard to it; and Great Men in it, or in general those who are at the head of the People, are, we find fufficiently anxious about the fuccess of their Speeches, or of the printed performances which they fomefometimes condescend to lay before the Public; nor has it been every Great Man wishing that a compliment may be paid to his personal knowledge, that has yentured to give such lasting specimens,

Several additions were made to this Work, at the time I gave the first English Edition of it. Befides a more accurate division of the chapters, fe-s veral new notes and paragraphs were inferted in it; for instance in the 11th chapter of the 2d Book; and three new chapters, the 15th, 16th, and 17th, amounting to about ninety pages, were added to the fame Book. These three additional chapters, never having been written by me in French, have been inserted in the third Edition made at Amsterdam, translated by a Person whom the Dutch Bookfeller employed for that purpose: as I never had an opportunity to peruse a copy of that Edition, I cannot fay how well the Translator has performed his talk. Having now parted with the copy-right of the Book, I have farther added four new chapters to it (10, 11, B. I. 19, 20, B. II.) by way of taking a final leave of it; and in order the more completely to effect this, I may perhaps give, in a few months, a French Edition of the same (which I cannot tell why I have not done fooner) in which all the above mentioned additions, translated by myself, shall be inferted.

In one of the former additional Chapters (the 17th, B. II. mention is made of a peculiar circumftance

stance attending the English Government, considered as a Monarchy, which is the folidity of the power of the Crown. As one proof of this peculiar folidity, it is remaked, in that Chapter, that all the Monarche who ever existed, in any part of the World, were never able to maintain their ground against certain powerful subjects (or a combination of them) without the affiftance of regular forces at their constant command; whereas it is evident that the power of the Crown, in England. is not at this day supported by such means; nor even had the English Kings a guard of more than a few scores of Men, when their power, and the exertions they at times made of it, were equal to what has ever been related of the most absolute Roman Emperors.

The cause of this peculiarity in the English Government is said, in the same Chapter, to lie in the circumstance of the great or powerful Men, in England, being divided into two distinct Assemblies, and at the same time, in the principles on which such a division is formed. To attempt to give a demonstration of this affertion otherwise than by sacts (as is done in the Chapter here alluded to) would lead into difficulties which the reader is little aware of. In general, the science of politics, considered as an exact science, that is to say, as a Science capable of actual demonstration, is infinitely deeper than the reader so much perhaps as suspects. The knowledge of Man, on which such a Science, with its preliminary axioms and definitions, is to be ground-

ed, has hitherto 'remained furprifingly imperfect: as one instance, how little Man is known to himfelf it might be mentioned that no tolerable explanation of that continual human phanomenon laughter, has been given, as yet; and the powerful complicate fentation which each sex produces in the other, still remains an equally inexplicable mystery.

To conclude the above digression (which may do very well for a Presace) I shall only add, that those Speculators who will amuse themselves in seeking for the demonstration of the political Theorem above expressed, will thereby be led through a field of observations which they will at first little expect; and in their way towards attaining such demonstration, will find the Science, commonly called Metaphysics, to be at best but a very superficial one, and that the Mathematics, or at least the mathematical reasonings hitherto used by Men, are not so completely free from error as has been thought.

Ont

Certain errors that are not discovered, are, in several cases, compensated by others, which are equally unperceived.

Continuing to avail myself of the indulgence an Author has a right to claim in a Preface, I shall mention, as a farther explanation of the peculiarity in the English Government above alluded to, and which is again touched spon in the postscript to this Advertisement, that a Govern-

ment

Out of the four Chapters added to the present Edition, two (the 10th and 11th, B. I.) contain among other things, a few strictures on the Courts of Equity; in which I wish it may be found I have not been mistaken; of the two others, the one (10th, B. II.) contains a few observations on the attempts that may in different circumstances be made, to fet new limits on the authority of the Crown; and in the 20th, a few general thoughts are introduced on the right of taxation, and on the claim of the American Colonies in that respect. Any farther observations I may hereafter make on the English Government, such as comparing it with the other Governments of Europe, and examining what difference in the manners of the inhabitants of this Country may have refulted from it. must come in a new Work, if I ever undertake to treat these subjects. In regard to the American difputes, what I may hereafter write on that account. will be introduced in a Work which I may at some future time publish, under the title of Histoire de George Trois, Roi & Angleterre, or, perhaps, of Hiftoire d' Angleterre, depuis l' Anneé 1765 (that in which the American Stamp duty was laid), jusques à l'Année 178-, meaning that in which an end shall be put to the present contests ..

Nov. 1781.

ment may be confidered as a great Ballet or Dance, in which, the fame as in other Ballets, every thing depends on the difposition of the figures.

• A certain Book written in French, on the subject of the American disputes, was, I have been told, lately attributed to me, in which I had no share,

#### POSTCRIPT.

Notwithstanding the intention above expressed, of making no additions to the prefent Work, I have found it necessary, in the present new Edition, to render somewhat more complete the xviith Chapter. B. II. p. 373, On the peculiar foundations of the Enghis Monarchy, as a Monarchy; as I found its tendency not to be very well understood; and in fact, that Chapter contained little more than hints on the fubject mentioned in it: the talk, in the course of writing, has increased beyond my expectation, and has fwelled the Chapter to about fixty pages beyond what it was in the former Edition, so as almost to make it a kind of separate Book by itself. reader will now find in it feveral remarkable new instances to prove the fact of the peculiar flability of the executive power of the British Crown; and especially a much more complete delineation of the advantages that refult from the stability in favour of public liberty ".

These advantages may be enumerated as follows:

I. The numerous restraints the governing authority is able to bear, and extensive freedom it can afford to allow the Subject, at its expence. II. The liberty of speaking and writing, carried to

For the fake of those Readers who like exactly to know in what one Edition of a Book differs from another, I shall mention, that five new pages have also been added in the xviiith Chapter, viz. page 456—460, besides a few short notes in the course of the Work: for instance in page 137, 371, &c.

the

the great extent it is in England. III. The unbounded freedom of the Debates in the Legislature. IV. The power to bear the constant union of all orders of Subjects against its prerogative. V. The freedom allowed to all individuals to take an active part in Government concerns. VI. The ftrict impartiality with which Justice is dealt to all Subjects, without any respect whatever of persons. VII. The lenity of the criminal law, both in regard to the mildness of punishments, and the frequent remitting of them. VIII. The strict compliance of the governing Authority with the letter of the law. IX. The needleffness of an armed force to support itfelf by, and as a confequence, the fingular subjection of the Military to the Civil power.

The above mentioned advantages are peculiar to the English Government. To attempt to imitate them, or transfer them into other Countries, with that degree of extent to which they are carried in England, without at the same time transferring the whole order and conjunctions of circumstances in the English Government, would prove unsuscessful attempts. Several articles of English liberty already appear impracticable to be preserved in the new American Commonwealths. The Irish Nation have of late fucceeded to imitate feveral very important regulations in the English Government, and are very defirous to render the affimilation complete: vet, it is possible, they will find many inconveniences to arise from their endeavours, which do not take place in England, notwithstanding the very great

kingdoms in many respects, and even also, we might add, notwithstanding the respectable power and weight the Crown derives from its British dominions, both for desending its prerogative in Ireland, and preventing anarchy. I say, the similarity in many respects between the two kingdoms; for this resemblance may perhaps fail in regard to some important points: however, this is a subject about which I shall not attempt to say any thing, not having the necessary information.

The last Chapter in the Work, concerning the natute of the Divisions that take place in this Country, I have left in every English Edition as I wrote it at first in French. With respect to the exact manner of the Debates in Parliament, mentioned in that Chapter, I should not be able to fay more at present than I was at that time, as I never had an opportunity to hear the Debates in either House. In regard to the Divisions in general to which the spirit of party gives rife, I did perhaps the bulk of the People somewhat more honour than they really deferve, when I represented them as being free from any violent dispositions in that respect: I have since found. that, like the bulk of Mankind in all Countries, they fuffer themselves to be influenced by vehement prepossessions for this or that side of public questions, commonly in proportion as their knowledge of the subject is imperfect. It is however a fact, that their political prepoffessions and party spirit are not productive, in this country, of those dangerous

confe-

consequences which might be feared from the warmth with which they are sometimes manifested. But this subject, or in general the subject of the political quarrels and divisions in this Country, is not an article one may venture to meddle with in a single Chapter; I have therefore let this subsist, without touching it.

I shall however observe, before I conclude, that there is an accidental circumstance in the English Government, which prevents the party spirit by which the Public are usually influenced, from producing those lasting and rancorous divisions in the Community which have peftered fo many other free States, making of the fame Nation as it were two distinct People, in a kind of constant warfare with each other. The circumstance I mean, is, the frequent reconciliations (commonly to quarrel again afterward) that take place between the Leaders of parties, by which the most violent and ignorant Class of their partizans are bewildered, and made to lose the scent. By the frequent coalitions between Whig and Tory Leaders, even that party distinction, the most famous in the English History, has now become useless: the meaning of the words has thereby been rendered fo perplexed that nobody can any longer give a tolerable definition of them; and those perfons who now and then aim at gaining popularity by claiming the merit of belonging to either party, are scarcely understood. The late Coalition between two certain Leaders has done away and prevented from fettling, that violent party spirit to which the administration of Lord Bute had given rife, and

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#### xvi ADVERTISEMENT.

which the American disputes had carried still farther. Though this Coalition has met with much obloquy, I take the liberty to rank myself in the number of its advocates, so far as the circumstance here mentioned.

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### ENGLAND.

#### INTRODUCTION.

THE spirit of Philosophy which peculiarly distinguishes the present age, after having corrected a number of errors fatal to Society, seems now to be directed towards the principles of Society itself; and we see prejudices vanish, which are difficult to overcome, in proportion as it is dangerous to attack them. This rising freedom of sentiment, the

As every popular notion which may contribute to the support of an arbitrary Government, is at all times vigilantly protected by the whole strength of it, political

#### THE CONSTITUTION

the necessary forerunner of political freedom, led me to imagine that it would not be unacceptable to the Public, to be made acquainted with the principles of a Constitution on which the eye of curiosity seems now to be universally turned; and which, though celebrated as a model of persection, is yet but little known to its admirers.

I am aware that it will be deemed prefumptous in a Man who has passed the greatest part of his life out of England, to attempt a delineation of the English Government; a system which is supposed to be so complicated as not to be understood or developed, but by those who have been initiated in the mysteries of it from their infancy.

But, though a foreigner in England, yet, as a native of a free Country, I am no stranger to those circumstances which constitute or characterise liberty. Even the great disproportion between the Republic of which I am

prejudices are, last of all, if ever, shaken off by a Nation subjected to such a Government. A great change in this respect, however, has of late taken place in France, where this book was first published, and opinions are now discussed there, and tenets avowed, which in the time of Lewis the Fourteenth, would have appeared downright blasphemy: it to this an allusion is made above.

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a member, and in which I formed my principles, and the British Empire, has perhaps only contributed to facilitate my political inquiries.

As the Mathematician, the better to discover the proportions he investigates, begins with freeing his equation from coefficients, or fuch other quantities as only perplex without properly constituting it,-fo it may be advantageous to the inquirer after the causes that produce the equilibrium of a government, to have previously studied them, disengaged from the apparatus of fleets, armies, foreign trade, distant and extensive dominions, in a word, from all those brilliant circumstances which so greatly affect the external appearance of a powerful Society. but have no effential connection with the real principles of it.

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It is upon the passions of Mankind, that is upon causes which are unalterable, that the action of the various parts of a State depends. The machine may vary as to its dimensions, but its movement and acting springs still remain intrinsically the fame; and that time cannot be confidered as loft, which has been fpent in feeing them act and move in a narrower liberty to at helebr, that guarded againston

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#### 4 THE CONSTITUTION

One other confideration I will fuggeft, which is, that the very circumstance of being a foreigner, may of itself be attended, in this case, with a degree of advantage. The English themselves (the observation cannot give them any offence) having their eyes open, as I may fay, upon their liberty, from their first entrance into life, are perhaps too much familiarised with its enjoyment, to enquire, with real concern, into its causes. Having acquired practical notions of their government, long before they have meditated on it, and these notions being flowly and gradually imbibed, they at length behold it without any high degree of fenfibility; and they feem to me, in this respect. to be like the recluse inhabitant of a palace, who is perhaps in the worst situation for attaining a complete idea of the whole, and never experienced the striking effect of its external structure and elevation; or, if you please, like a Man who, having always had a beautiful and exrensive scene before his eyes, continues for ever to view it with indifference.

But a stranger, beholding at once the various parts of a Constitution displayed before him, which at the same time that it carries liberty to its height, has guarded against inconveniences seemingly inevitable, beholding in short

short those things carried into execution, which he had ever regarded as more defirable than poffible, he is struck with a kind of admiration; and it is necessary to be thus strongly affected by objects, to be enabled to reach the general principle which governs them.

Not that I mean to infinuate that I have penetrated with more acuteness into the Constitution of England than others; my only defign in the above observations, was to obviate an unfavourable, though natural, prepoffession; and, if, either in treating of the causes which originally produce the English liberty, or of those by which it continues to be maintained, my obfervations should be found new or singular, I hope the English reader will not condemn them, but where they shall be found inconsistent with History, or with daily experience. Of readers in general I also request, that they will not judge of the principles I shall lay down, but from their relation to those of human nature: a consideration which is almost the only one essential, and has been hitherto too much neglected by the Writers on the fubject of government,

B 3 CHAP.

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# CHAP. I.

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Over their things can'ed lare execution, which

Causes of the liberty of the English Nation.—
Reasons of the difference between the Government of England, and that of France.—In
England, the great power of the Crown, under
the Norman kings, created an union between the
Nobility and the People.

WHEN the Romans, attacked on all fides by the Barbarians, were reduced to the necessity of defending the centre of their Empire, they abandoned Great Britain as well as several other of their distant provinces. The island, thus lest to itself, became a prey to the Nations inhabiting the shores of the Baltic; who, having first destroyed the ancient inhabitants, and for a long time reciprocally annoyed each other, established several Sovereignties in the southern part of the Island, afterwards called England, which at length were united, under Egbert, into one Kingdom.

The fuccessors of this Prince, denominated the Anglo-Saxon Princes, among whom Alfred the Great and Edward the Confessor are particularly celebrated, reigned for about two hundred

years; but, though our knowledge of the principal events of this early period of the English History is in some degree exact, yet we have but vague and uncertain accounts of the nature of the Government which those Nations intro-

It appears to have had little more affinity with the prefent Constitution, than the general relation, common indeed to all the Governments established by the Northern Nations, that of having a King and a Body of Nobility; and the ancient Saxon Government is " left us in story (to use the expressions of " fir William Temple on the subject) but like " fo many antique, broken, or defaced pic-" tures, which may still represent something " of the customs and fashions of those ages, " though little of the true lines, proportions, " or refemblance \*."

It is at the era of the Conquest, that we are to look for the real foundation of the English Constitution. From that period, fays Spelman, novus sectorum nascitur ordo +. William of Normandy,

<sup>.</sup> See his Introduction to the History of England.

<sup>+</sup> See Spelman, Of Parliaments. - It has been a favourite thesis with many Writers, to pretend that the Saxon Government was, at the time of the Conquest, by cathe raws Acres to judge our challenging Power -

#### . THE CONSTITUTION

mandy, having defeated Harold, and made himself master of the Crown, subverted the ancient

no means subverted; that William of Normandy legally acceded to the Throne, and consequently to the engagements of the Saxon Kings; and much argument has in particular been employed with regard to the word Conquest, which, it has been said, in the seudal sense only meant acquisition. These opinions have been particularly insisted upon in times of popular opposition: and, indeed, there was a far greater probability of success, in raising among the People the notions familiar to them of legal claims and long established customs, than in arguing with them from the no less rational, but less determinate, and somewhat dangerous doctrines, concerning the original rights of Mankind, and the lawfulness of at all times opposing force to an oppressive Government.

But if we consider that the manner in which the public Power is formed in a State, is so very essential a part of its Government, and that a thorough change in this respect was introduced into England by the Conquest, we shall not scruple to allow that a new Government was established. Nay, as almost the whole landed property in the Kingdom was at that time transferred to other hands, a new System of criminal Justice introduced, and the language of the law moreover altered, the revolution may be said to have been such as is not perhaps to be paralleled in the History of any other Country.

Some Saxon laws, favourable to the liberty of the people, were indeed again established under the successfors of William; but the introduction of some new modes of proceeding in the Courts of Justice, and of a few particular laws, cannot, so long as the ruling Power

ancient fabric of the Saxon Legislation: he exterminated, or expelled, the former occupiers of lands, in order to distrubute their possessions among his followers; and established the feudal system of Government, as better adapted to his situation, and indeed the only one of which he possessed a competent idea,

in the flate remains the same, be said to be the introduction of a new Government; and as when the laws in question were again established, the public power in England continued in the same channel where the Conquest has placed it, they were more properly new modifications of the Anglo-Norman Constitution, than they were the abolition of it; or since they were again adopted from the Saxon Legislation, they were rather imitations of that legislation, than the restoration of the Saxon Government.

Contented, however, with the two authorities I have above quoted (Spelman and Temple), I shall dwell no longer on a discussion of the precise identity, or difference, of two Governments, that is of two ideal systems, which only exist in the conceptions of men. Nor do I wish to explode a doctrine, which, in the opinion of some persons, giving an additional sanction and dignity to the English Government, contributes to increase their love and respect for it. It will be sufficient for my purpose, if the reader shall be pleased to grant that a material change was, at the time of the Conquest, effected in the Government then existing, and is accordingly disposed to admit the proofs that will presently be laid before him, of such change having prepared the establishment of the present English Constitution.

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This fort of Government prevailed also in almost all the other parts of Europe. But, inftead of being established by dint of arms and all at once, as in England, it had only been established on the Continent, and particularly in France, through a long feries of flow fuccessive events; a difference of circumstances this, from which consequences were in time to arife, as important as they were at first difficult to be foreseen.

The German Nations who passed the Rhine to conquer Gaul, were in a great degree independent. Their Princes had no other title to their power, but their own valour and the free election of the people; and as the latter had acquired in their forests but contracted notions of fovereign authority, they followed a Chief, less in quality of subjects, than as companions in conquest.

Besides, this conquest was not the irruption of a foreign army, which only takes possession of fortified towns. It was the general invasion of a whole People, in fearch of new habitations; and as the number of the Conquerors bore a great proportion to that of the conquered, who were at the fame time enervated by long peace, the expedition was no fooner completed than all danger was at an end, and of course their union

union also. After dividing among themselves what lands they thought proper to occupy, they separated; and though their tenure was at first only precarious, yet in this particular, they depended not on the King, but on the general assembly of the Nation \*.

Under the Kings of the first race, the fiefs, by the mutual connivance of the Leaders, at first became annual; afterwards, held for life. Under the descendants of Charlemain, they became hereditary †. And when at length Hugh Capet effected his own election to the prejudice of Charles of Lorrain, intended to render the Crown, which in fact was a fief, hereditary in his own family ‡, he established the hereditariship of fiefs as a general principle; and from this epoch, authors date the complete establishment of the seudal system in France.

\* The fiefs were originally called, terræ jure beneficii concessa; and it was not till under Charles le Gros the term sief began to be in use. See Beneficium, Gloss.

Du Cange.

† Apud Francos vero, sensim pedetentimque, jure bæreditario ad bæredes transserunt seuda; quod labente sæculo nono incipis. See Feudum—Du Cange.

‡ Hottoman has proved beyond a doubt, in his Francegallia, that under the two first races of Kings, the Crown of France was elective. The Princes of the reigning family had nothing more in their favour than the custom of chusing one of that house.

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On the other hand, the Lords who gave their fuffrages to Hugh Capet, forgot not the interest of their own ambition. They completed the breach of those feeble ties which subjected them to the royal authority, and became every where They left the King no jurifindependent. diction either over themselves, or their Vassals; they referved the right of waging war with each other; they even affumed the same privilege, in certain cases, with regard to the King himself '; so that if Hugh Capet, by rendering the Crown hereditary, laid the foundation of the greatness of his family, and of the Crown itself, yet he added little to his own authority, and acquired scarcely any thing more than a nominal fuperiority over the number of Sovereigns who then swarmed in France +.

But

The principal of these cases was when the King refused to appoint Judges to decide a difference between himself and one of his sirst Barons; the latter had then a right to take up arms against the King; and the subordinate Vassals were so dependent on their immediate Lords, that they were obliged to sollow them against the Lord Paramount. St. Louis, though the power of the Crown was in his time much increased, was obliged to confirm both this privilege of the first Barons, and this obligation of their Vassals.

<sup>† &</sup>quot; The Grandees of the Kingdom," fays Mezeray, " thought that Hugh Capet ought to put up with all "their

But the establishment of the seudal system in England, was an immediate and sudden consequence of that conquest which introduced it. Besides this conquest was made by a Prince who kept the greater part of his army in his own pay, and who was placed at the head of a people over whom he was an hereditary Sovereign: circumstances which gave a totally different turn to the Government of that kingdom.

Surrounded by a warlike, though a conquered Nation, William kept on foot part of his army. The English, and after them the Normans themselves, having revolted, he crushed both; and the new King of England, at the head of victorious troops, having to do with two Nations laying under a reciprocal check from the enmity they bore to each other, and moreover equally subdued by a sense of their unfortunate attempts of resistance, found himself in the most savourable circumstances for becoming an absolute Monarch; and

<sup>&</sup>quot;their infults, because they had placed the Crown on his head: nay, so great was their licentiousness, that on his writing to Audebert, Viscount of Perigueux, ordering him to raise the siege he had laid to Tours, and asking him, by way of reproach, who had made him a Viscount? that Nobleman haughtily answered, Not you, but those who made you a King. [Non pas yous, mais ceux qui yous ont fait Roi.]"

#### 14 THE CONSTITUTION

his laws thus promulgated in the midst as it were of thunder and lightning, imposed the yoke of despotism both on the victors and the vanquished.

He divided England into fixty thousand two hundred and fifteen military fiefs, all held of the Crown; the possessions of which, were, on pain of forseiture, to take up arms, and repair to his standard on the first signal: he subjected not only the common people, but even the Barons to all the rigours of the seudal Government: he even imposed on them his tyrannical forest laws.\*

He assumed the prerogative of imposing taxes. He invested himself with the whole executive power of Government. But what was of the greatest consequence, he arrogated to himself the most extensive judicial power by the establishment of the Court which was called Aula Regis; a formidable tribunal, which re-

\* He reserved to himself an exclusive privilege of killing game throughout England, and enacted the severest penalties on all who should attempt it without his permission. The suppression, or rather mitigation of these penalties, was one of the articles of the Charta de Foresta, which the Barons afterwards obtained by force of arms. Nullus de cætero amittat vitam, vel membra, pro venatione nostrâ. Ch. de Forest. Art. 10.

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rons, and decided in the last resort on the estates, honour, and lives of the Barons themselves; and which, being wholly composed of the great officers of the Crown, removable at the King's pleasure, and having the King himself for President, kept the first Nobleman in the Kingdom under the same controul as the meanest subject.

Thus, while the Kingdom of France, in consequence of the slow and gradual formation of the seudal government, sound itself, in the issue, composed of a number of parts simply placed by each other, and without any reciprocal adherence, the Kingdom of England on the contrary, in consequence of the sudden and violent introduction of the same system, became a compound of parts united by the strongest ties, and the regal Authority, by the the pressure of its immense weight, consolidated the whole into one compact indissoluble body.

To this difference in the original Constitution of France and England, that is, in the original power of their Kings, we are to attribute the difference, so little analogous to its original cause, of their present Constitutions. This it is which furnishes the solution of a problem which, I must consess, for a long time perplexed me, and explains the reason why, of two neighbouring Nations, fituated almost under the same climate, and having one common origin, the one has attained the summit of liberty, the other has gradually sunk under an absolute Monarchy.

In France, the royal Authority was indeed inconfiderable; but this circumstance was by no means favourable to the general liberty. The Lords were every thing; and the bulk of the Nation were accounted nothing. All those wars which were made on the King, had not liberty for their object; for of this the Chiefs already enjoyed but too great a share: they were the mere effect to private ambition or caprice. The People did not engage in them as affociates in the support of a cause common to all; they were dragged, blindfold and like flaves, to the standard of their Leaders. In the mean time, as the laws by virtue of which their Mafters were confidered as Vaffals, had no relation to those by which they were themselves bound as fubjects, the refistance of which they were made the instruments, never produced any advantageous consequence in their favour, nor did it establish any principle of freedom that was in any case applicable to them.

The inferior Nobles, who shared in the independence of the superior Nobility, added also the

the effects of their own insolence to the despotifm of fo many Sovereigns; and the people, wearied out by fufferings, and rendered desperate by oppression, at times attempted to revolt. But being parcelled out into fo many different States, they could never perfectly agree, either in the nature, or the times of their complaints. The infurrections, which ought to have been general, were only fuccessive and particular. In the mean time the Lords, ever uniting to avenge their common cause as Masters, fell with irrefiftible advantage on Men who were divided; the People were thus separately, and by force, brought back to their former yoke; and Liberty, that precious offspring, which requires fo many favourable circumstances to foster it, was every where stifled in its birth \*.

At length, when by conquests, by escheats, or by Treaties, the several Provinces came to be re-united † to the extensive and continually increasing

<sup>\*</sup> It may be feen in Mezeray, how the Flemings, at the time of the great revolt which was caused, as he says, " by the inveterate hatred of the Nobles (les Gentilss hommes) against the people of Ghent," were crushed by the union of almost the Nobility of France.—See Mezeray, Reign of Chrles VI.

<sup>†</sup> The words re-union expresses in the French law, or

creafing dominions of the Monarch, they became subject to their new Master, already trained

History, the reduction of a Province to an immediate dependence on the Crown. The French lawyers, who were at all times remarkably zealous for the aggrandifement of the Crown (a zeal which would not have been blameable, if it had been exerted only in the suppression of lawless Aristocary) always contended that when a province once came into the possession of the King, even any private dominion of his before he acceded to the Throne, it became re-united for ever: the Ordonnance of Moulins, in the year 1566, has fince given a thorough fanction to these principles. The re-union of the province might be occasioned, first, by the case just mentioned, of the accession of the possessior of it to the throne : thus at the accession of Henry IV. (the fister of the late King being excluded by the Salic law) Navarre and Bearn were re-united. Secondly, by the felony of the possession, when the King was able to force by dint of arms, the judgment passed by the Judges he had appointed : thus the fmall Lordship of Lambouillet was seized upon by Hugh Capet: on which authors remark that it was the first dominion that was re-united : and the duchy of Normandy was afterwards taken in the same manner by Philip Augustus from John King of England, condemned for the murder of Arthur Duke of Britanny. Thirdly, by the last will of the possessor: Provence was re-united in this manner, under the reign of Lewis XI. Fourthly, by intermarriages : this was the case of the county of Champagne, under Philip the Fair; and of Britanny under Francis I. Fifthly, by the failure of heirs of the blood, and fome-

to obedience. The few privileges which the Cities had been able to preserve, were little respected by a Sovereign who had himself entered into no engagement for that purpose; and as the re-unions were made at different times, the King was always in a condition to overwhelm every new Province that accrued to him, with the weight of all those he already possessed.

As a farther consequence of these differences between the times of the *re-unions*, the several parts of the Kingdom entertained no views of

times of heirs male: thus Burgundy was seized upon by Lewis XI. after the death of Charles the Bold, Duke of that Province. Lastly, by purchases: thus Philip of Valois purchased the Barony of Montpellier; Henry IV. the Marquisate of Saluces; Lewis XIII. the Principality of Sedan, &c.

These different Provinces, which with others united, or re-united, after a like manner, now compose the French Monarchy, not only thus conferred on their respective Sovereigns different titles, but also differed from each other with respect to the laws which they followed, and still follow: the one are governed by the Roman law, and are called Pays de Droit écrit; the others follow particular customs, which in process of time have been set down in writing, and are called Pays de Droit Coutumier. In those Provinces the people had, at times, purchased privileges from their Princes, which in the different Provinces were also different, according to the want and temper of the Princes who granted them.

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affifting each other. When fome reclaimed their privileges, the others, long fince reduced to fubjection, had already forgotten their's. Befides, these privileges, by reason of the differences of the Governments under which the Provinces had formerly been held, were also almost every where different: the circumstances which happened in one place, thus bore little affinity to those which fell out in another; the spirit of union was lost, or rather had never existed: each Province, restrained within its particular bounds, only ferved to infure the general submission; and the same causes which had reduced that warlike, spirited Nation, to a yoke of fubjection, concurred also to keep them under it.

Thus Liberty perished in France, because it wanted a favourable culture and proper fituation. Planted, if I may fo express myself, but just beneath the furface, it presently expanded, and fent forth some large shoots; but having taken no root, it was foon plucked up. In England, on the contrary, the feed lying at a great depth, and being covered with an enormous weight, feemed at first to be smothered; but it vegetated with the greater force; it imbibed a more rich and abundant nourishment; its sap and juice became better assimilated, and it penetrated and filled up with its roots the whole

whole body of the foil. It was the excessive power of the King which made England free, because it was this very excess that gave rise to the spirit of union, and of concerted resistance. Possessed of extensive demesses, the King sound himself independent; vested with the most formidable prerogatives, he crushed at pleasure the most powerful Barons in the Realm: it was only by close and numerous confederacies therefore, that these could resist his tyranny; they even were compelled so associate the People in them, and make them partners of public Liberty.

Affembled with their Vassals in their great Halls, where they dispensed their hospitality, deprived of the amusements of more polished Nations, naturally inclined, besides, freely to expatiate on objects of which their hearts were full, their conversation naturally turned on the injustice of the public impositions, on the tyranny of the judicial proceedings, and, above all, on the detested forest laws.

Destitute of an opportunity of cavilling about the meaning of laws, the terms of which were precise, or rather disdaining the resource of sophistry, they were naturally led to examine into the first principles of Society; then enquired into the soundations of human authority,

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and became convinced, that Power, when its object is not the good of those who are subject to it, is nothing more than the right of the strongest, and may be repressed by the exertion of a similar right.

The different orders of the feudal Government, as established in England, being connected by tenures exactly fimilar, the fame maxims which were laid down as true against the Lord paramount in behalf of the Lord of an upper fief, were likewise to be admitted against the latter, in behalf of the owner of an inferior fief. The fame maxims were also to be applied to the possessor of a still lower fief: they farther descended to the freeman, and to the peafant; and the spirit of liberty, after having circulated though the different branches of the feudal fubordination, thus continued to flow through fuccessive homogeneous channels; it forced a passage to itself into the remotest ramifications, and the principle of primeval equality became every where diffused and established. A facred principle, which neither injuffice nor ambition can erase; which exists in every breast, and, to exert itself, requires only to be awakened among the numerous and oppressed classes of Mankind.

But when the Barons, whom their personal consequence had at first caused to be treated with caution and regard by the Sovereign, began to be no longer so, when the tyrannical laws of the Conqueror became still more tyrannically executed, the consederacy, for which the general oppression had paved the way, instantly took place. The Lord, the Vassal, the inferior Vassal, all united. They even implored the assistance of the peasants and cottagers; and that haughty aversion with which on the Continent the Nobility repaid the industrious hands which sed them, was, in England, compelled to yield to the pressing necessity of setting bounds to the Royal authority.

The People, on the other hand, knew that the cause they were called upon to desend, was a cause common to all; and they were sensible, besides, that they were the necessary supporters of it. Instructed by the example of their Leaders, they spoke and stipulated conditions for themselves: they insisted that, for the suture, every individual should be intitled to the protection of the laws; and thus did those rights with which the Lords had strengthened themselves, in order to oppose the tyranny of the Crown, become a bulwark which was, in time, to restrain their own.

CHAP.

#### 24 THE CONSTITUTION

## CHAP. II.

A second advantage England had over France:

—it formed one undivided State.

IT was in the reign of Henry the First, about forty years after the Conquest, that we fee the above causes begin to operate. This Prince having ascended the throne to the exclusion of his elder brother, was sensible that he had no other means to maintain his power than by gaining the affection of his subjects; but, at the fame time, he perceived that it must be the affection of the whole nation: he, therefore, not only mitigated the rigour of the feudal laws in favour of the Lords, but also annexed as a condition to the Charter he granted, that the Lords should allow the same freedom to their respective Vassals. Care was even taken to abolish those laws of the Conqueror which lay heaviest on the lower classes of the People \*.

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<sup>\*</sup> Amongst others, the law of the Curfeu. It might be matter of curious discussion to inquire what the Anglo-Saxon Government would in process of have time become, and of course the Government of England be, at this present

Under Henry the Second, liberty took a farther stride; and the ancient Trial by Jury, a mode of procedure which is at present one of the most valuable parts of the English law, made again, though impersectly, its appearance.

But these causes, which had worked but silently and slowly under the two Henrys, who were Princes in some degree just, and of great capacity, manifested themselves, at once, under the despotic reign of King John. The royal prerogative, and the forest laws, having been exerted by this Prince to a degree of excessive severity, he soon beheld a general consederacy formed against him: and here we must observe another circumstance, highly advantageous, as well as peculiar to England.

England was not, like France, an aggregation of a number of different Sovereignties:

fent time, if the event of the Conquest had never taken place; which, by conferring an immense as well as unusual power on the head of the seudal System, compelled the Nobility to contract a lasting and fincere union with the People. It is very probable that the English Government would at this day be the same as that which long prevailed in Scotland, where the King and Nobles engrossed, jointly, or by turns, the whole power in the State, the same as in Sweden, the same as in Denmark, Countries whence the Anglo-Saxons came.

it formed but one State, and acknowledged but one Master, one general title. The same laws, the same kind of dependence, consequently the same notions, the same interests, prevailed throughout the whole. The extremities of the kingdom could, at all times, unite to give a check to the exertions of an unjust power. From the river Tweed to Portsmouth, from Yarmouth to the Land's End, all was in motion: the agitation increased from the distance like the rolling waves of an extensive sea; and the Monarch left to himself, and destitute of resources, saw himself attacked on all sides by an universal combination of his subjects.

No fooner was the standard set up against John, than his very Courtiers forsook him. In this situation, finding no part of his kingdom less irritated against him than another, having no detached province which he could engage in his desence by promises of pardon, or of peculiar concessions, the trivial though never-failing resources of Government, he was compelled with seven of his attendants, all that remained with him, to submit himself to the disposal of his subjects; and he signed at Runing Mead the Charter of the Forest, together

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with that famous charter, which, from its superior and extensive importance, is denominated Magna Charta.

By the former the most tyrannical part of the forest laws was abolished; and by the latter, the rigour of the feudal laws was greatly mitigated in favour of the Lords. But this Charter did not stop there; conditions were also stipulated in favour of the numerous body of the people who had concurred to obtain it, and who claimed, with fword in hand, a share in that fecurity it was meant to establish. It was hence instituted by the Great Charter, that the fame fervices which were remitted in favour of the Barons, should be in like manner remitted in favour of their Vasfals. This Charter moreover established an equality of weights and measures throughout England; it exempted the Merchants from arbitrary imposts, and gave them liberty to enter and depart the Kingdom at pleasure: it even extended to the lowest orders of the State, fince it enacted, that the Villain, or Bondman, should not be subject to the forfeiture of his implements of tillage. Laftly, by the twenty-ninth article of the same Charter, it was enacted, that no subject should be exiled, or in any shape whatever molested, either in his person or effects, otherwise than

#### THE CONSTITUTION

by judgment of his peers, and according to the law of the land \*: an article fo important, that it may be faid to comprehend the whole end and defign of political focieties; and from that moment the English would have been a free People, if there were not an immense distance between the making of laws, and the observing of them.

But though this Charter wanted most of those supports which were necessary to insure respect to it, though it did not secure to the poor and friendless any certain and legal methods of obtaining the execution of it (provisions which numberless transgressions alone could, in process of time point out), yet it was a prodigious advance towards the establishment of public liberty. Instead of the general maxims respecting the rights of the People and the duties of the Prince (maxims against which ambition perpetually contends, and which it fometimes even openly and abfo-

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<sup>&</sup>quot; Nullus liber homo capiatur, vel imprisonetur, vel " diffesietur de libero tenemento suo, vel libertatibus, vel " liberis consuetudinibus suis; aut utlagetur, aut exuletur, " aut aliquo modo destruatur; nec super eum ibimus, nec \* super eum mittemus, nist per legale judicium parium " fuorum, vel per legem terræ. Nulli vendemus, nulli " negabimus, aut differemus, justitiam vel rectum." Magna Chart. cap. xxix.

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lutely denies), here was substituted a written law, that is, a truth admitted by all parties, which no longer required the support of argument. The rights and privileges of the individual, as well in his person as in his property, became settled axioms. The Great Charter, at first enacted with so much solemnity, and afterwards confirmed at the beginning of every succeeding reign, became like a general banner perpetually set up for the union of all classes of the people; and the soundation was laid on which those equitable laws were to rise, which offer the same affistance to the poor and weak, as to the rich and powerful.

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\* The reader, to be more fully convinced of the reality of the causes to which the liberty of England has been here ascribed, as well as to the truth of the observations made at the fame time on the fituation of the people of France, needs only to compare the Great Charter. fo extensive in its provisions, and in which the Barons ftipulated in favour even of the Bondman, with the treaty concluded between Lewis the Eleventh and several of the Princes and Peers of France, intitled, A Treaty made at St. Maur, between the Dukes of Normandy, Calabre, Bretagne, Bourbonnois, Auvergne, Nemours; the Counts of Charolois, Armagnac, and St. Pol, and other Princes of France, risen up in support of the public good, of the one part; and King Lewis the Eleventh of the other, October 29, 1465. In this Treaty, which was made in order to terminate a war that was called the war for the Public good (pro bone Pub-

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Under the long reign of Henry the Third, the differences which arose between the King and the Nobles, rendered England a fcene of confusion. Amidst the viciffitudes which the fortune of war produced in their mutual conflicts, the People became still more and more fensible of their importance, and so did in confequence both the King and the Barons also. Alternately courted by both parties, they obtained a confirmation of the Great Charter, and even the addition of new privileges, by the statutes of Merton and of Marlebridge. But I haften to reach the grand epoch of the reign of Edward the First; a Prince, who, from his numerous and prudent laws, has been denominated the English Justinian.

Possessed of great natural talents, and succeeding a Prince whose weakness and injustice had rendered his reign unhappy, Edward was sensible that nothing but a strict administration of justice, could, on the one side, curb a Nobility whom the troubles of the preceding reign had rendered turbulent, and on the other, ap-

Publico), no provision was made but concerning the particular power of a few Lords: not a word was inserted in favour of the people. This treaty may be seen at large in the pieces justificatives annexed to the Memoires de Philippe de Comines. rd,

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pease and conciliate the people, by securing the property of individuals. To this end, he made jurisprudence the principal object of his attention; and so much did it improve under his care, that the mode of process became fixed and settled; Judge Hale going even so far as to affirm, that the English laws arrived at once, and sper saltum, at perfection, and that there has been more improvement made in them during the first thirteen years of the reign of Edward, than all the ages since his time have done.

But what renders this æra particularly interesting, is, that it affords the first instance of the admission of the Deputies of Towns and boroughs into \* Parliament.

Edward, continually engaged in wars, either against Scotland or on the Continent, seeing moreover his demesses considerably diminished, was frequently reduced to the most pressing necessities. But though, in consequence of the spirit of the times, he frequently indulged himself in particular acts of injustice, yet he perceived that it was impossible to extend a general oppression over a body of Nobles, and a People,

• I mean their legal origin; for the Earl of Leieester, who had usurped the power during part of the preceding reign, had called such Deputies up to Parliament before.

who

# 32 THE CONSTITUTION

who so well knew how to unite in a common cause. In order to raise subsidies, therefore, he was obliged to employ a new method, and to endeavour to obtain through the consent of the People, what his Predecessors had hitherto expected from their own power. The sheriffs were ordered to invite the Towns and Boroughs of the different Counties to send Deputies to Parliament; and it is from this æra that we are to date the origin of the House of Commons.

It must be consessed, however, that these Deputies of the People were not, at first, possessed of any considerable authority. They were far from enjoying those extensive privileges which, in these days, constitute the House of Commons a collateral part of the Government: they were in those times called up only to provide for the wants of the King, and approve of the resolutions taken by him and the assembly of the Lords †. But it was nevertheless

\* Anno 1295.

<sup>†</sup> The end mentioned in the Summons sent to the Lords, was de arduis negotiis regni tradaturi & consilium impensuri: the Summons sent to the Commons was, ad faciendum & consentiendum. The power enjoyed by the latter
was even inserior to what they might have expected from
the Summons sent to them: "In most of the ancient Sta-

a great point gained, to have obtained the right of uttering their complaints, affembled in a body and in a legal way—to have acquired, instead of the dangerous resource of insurrections, a lawful and regular mean of insurections, a lawful and regular mean of insurections of the Government, and thenceforth to have become a part of it. Whatever disadvantage might attend the station at first allotted to the Representatives of the People, it was soon to be compensated by the preponderance the People necessarily acquire, when they are enabled to act and move with method, and especially with concert †.

And

"tutes they are not so much as named; and in several,
"even when they are mentioned, they are distinguished as petitioners merely, the Assent of the Lords being expressed in
contradistinction to the Request of the Commons." See on
this subject the Presace to the Collection of the Statutes at
large, by Russhead, and the authorities quoted therein.

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+ France had indeed also her assemblies of the General Estates of the Kingdom, in the same manner as England had her Parliament; but then it was only the Deputies of the Towns within the particular domain of the Crown, that is, for a very small part of the Nation who, under the name of the Third Estate, were admitted in those Estates; and it is easy to conceive that they acquired no great insluence in an assembly of Sovereigns who gave the law to their Lord Para-

And indeed this privilege of naming Representatives, infignificant as it might then appear, presently manifested itself by the most considerable effects. In spite of his reluctance, and after many evasions unworthy of so great a King, Edward was obliged to confirm the Great Charter; he even confirmed it eleven times in the course of his reign. It was moreover enacted, that whatever should be done contrary to it, should be null and void; that it should be read twice a year in all Cathedrals; and that the penalty of excommunication should be denounced against any one who should presume to violate it †.

At length he converted into an established law a privilege of which the English had hitherto had only a precarious enjoyment; and, in the statue de Tallagio non concedendo, he decreed, that no tax should be laid, nor impost levied, without the joint consent of the Lords and Commons. A most important Statute this,

mount. Hence, when these disappeared, the maxim became immediately established, The will of the King is the will of the Law. In old French, Qui went le Roy, si went la Loy.

<sup>+</sup> Confirmationes Chartarum, cap. 2, 3, 4.

<sup>&</sup>quot; Nullum tallaginm vel- auxilium, per nos, vel

this, which, in conjunction with Magna Charta, forms the basis of the English Constitution. If from the latter the English are to date the origin of their liberty, from the former they are to date the establishment of it; and as the Great Charter was the bulwark that protected the freedom of individuals, so was the Statute in question the engine which protected the Charter itself, and by the help of which the People were thenceforth to make legal conquests over the authority of the Crown.

This is the period at which we must stop, in order to take a distant view, and contemplate the different prospect which the rest of Europe then presented.

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The efficient causes of slavery were daily operating and gaining strength. The independence of the Nobles on the one hand, the ignorance and weakness of the People on the other, continued to be extreme: the seudal government still continued to diffuse oppression and misery; and such was the confussion of it, that it even took away all hopes of amendment.

France, still bleeding from the extravagance of a Nobility incessantly engaged in groundless

<sup>&</sup>quot; fine voluntate & affensu Archiepiscoporum, Episcoporum,

<sup>&</sup>quot; Comitum, Baronum, Militum, Burgenfium, & aliorum

<sup>&</sup>quot; liberorum hom' de regno nostro." Stat. an. 24 Ed. I.

wars, either with each other, or with the King, was again defolated by the tyranny of that fame Nobility, haughtily jealous of their liberty, or rather of their anarchy. The People, oppressed by those who ought to have guided and protected them, loaded with insults by those who existed by their labour, revolted on all sides. But their tumultuous insurrections had scarcely any other object than that of giving vent to the anguish with which their hearts were full. They had no thoughts of entering into a general combination; still less of changing the form of the Government, and laying a regular plan of u blic liberty.

Having never extended their views beyond the fields they cultivated, they had no conception of those different ranks and orders of Men, of those distinct and opposite privileges and prerogatives, which are all necessary ingredients

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<sup>\*</sup> Not contented with oppression, they added insult. 
When the Gentility," says Mezeray, "pillaged and committed exactions on the peasantry, they called the poor sufferer, in derission Jaques benbomme (Goodman James.) This gave rise to a surious sedition, which was called the Jaquerie. It began at Beauvais in the year 1357, extending itself into most of the Provinces of France, and was not appealed but by the destruction of part of those unhappy victims, thousands of whom were slaughtered."

of a free Constitution. Hitherto confined to the same round of rustic employments, they little thought of that complicated fabric, which the more informed themselves cannot but with difficulty comprehend, when by a concurrence of savourable circumstances, the structure has at length been reared, and stands displayed to their view.

In their simplicity they saw no other remedy for the national evils than the general establishment of the Regal power, that is, of the authority of one common uncontrouled master, and only longed for that time, which, while it gratisfied their revenge, would mitigate their sufferings, and reduce to the same level both the oppressors and the oppressed.

The Nobility, on the other hand, bent folely on the enjoyment of a momentary independence, irrecoverably lost the affection of the only Men who might in time support them; and, equally regardless of the dictates of humanity and of prudence, they did not perceive the gradual and continual advances of the royal authority, which was soon to overwhelm them all. Already were Normandy, Anjou, Languedoc, and Touraine, re-united to the Crown; Dauphiny, Champagne, and part of Guienne, were soon to follow: France was doomed at

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It was the destiny of Spain also to behold her several Kingdoms united under one Head; she was sated to be in time ruled by Ferdinand and Charles and Fifth \*. And Germany, where an elective Crown prevented the re-unions †, was indeed to acquire a sew free Cities:

\* Spain was originally divided into twelve Kingdoms, befides the Principalities, which by Treaties, and especially by Conquests, were collected into three Kingdoms; those of Castile, Aragon, and Granada. Ferdinand the Fifth, King of Aragon, married Isabella, Queen of Castile; they made a joint Conquest of the Kingdom of Granada, and these three Kingdoms, thus united, descended, in 1516, to their grandson Charles V, and formed the Spanish Monarchy. At this æra, the Kings of Spain began to be absolute; and the States of the Kingdoms of Castile and Leon, "assembled at Toledo, in the month of November, 1539, were the last in which the three orders met, that is the Grandees, the Ecclesiastics, and the Deputies of the Towns." See Ferrara's General History of Spain.

† The Kingdom of France, as it stood under Hugh Capet and his next Successors, may, with a great degree of exactness, be compared with the German Empire as it exists at present, and also existed at that time: but the Imperial Crown of Germany having, through a conjunction

Cities; but her people, parcelled into so many different dominions, were destined to remain subject to the arbitrary yoke of such of her different Sovereigns as should be able to maintain their power and independence. In a word, the seudal tyranny which overspread the Continent, did not compensate, by any preparation of distant advantages, the present calamities it caused; nor was it to leave behind it, as it disappeared, any thing but a more regular kind of Despotism.

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But in England, the same seudal system, after having suddenly broken in like a slood, had deposited, and still continue to deposit, the noble seeds of the spirit of liberty, union, and sober resistance. So early as the times of Edward, the tide was seen gradually to subside; the laws which protect the person and property of the individual, began to make their appearance;

tion of circumstances, continued elective, the German Emperors, though vested with more high-sounding prerogatives than even the Kings of France, laboured under
very essential disandvantages: they could not pursue a plan
of aggrandisement with the same steadiness as a line of
hereditary Sovereigns usually do; and the right to elect
them, enjoyed by the greater Princes of Germany, procured a sufficient power to these, to protect themselves,
as well as the lesser Lords, against the power of the
Crown,

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that admirable Conflitution, the result of a threefold power, insensibly arose \*; and the eye might even then discover the verdant summits of that fortunate region that was destined to be the seat of Philosophy and Liberty, which are inseparable companions.

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\* "Now, in my opinion," fays Philipe de Comines, in times not much posterior to those of Edward the First, and with the simplicity of the language of his times, "among all the sovereignties I know in the world, that in which the public good is best attended to, and the least violence exercised on the people, is that of Eng. "land," Memoires de Comines, tom, I. lib, v. chap. xix,

political, and thill continue to depolitation noble feeds of the igner of liberry lamon, and allow returned of the control of

tion of anconference comment signifies, the Central classes of American Central classes of American American Central classes and American Comments of American Comments of Central Comment

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# CHAPTER III.

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The Subject continued.

THE Representatives of the Nation, and of the whole Nation, were now admitted into Parliament: the great point therefore was gained, that was one day to procure them the great influence which they at present posses; and the subsequent reigns afford continual instances of its successive growth.

Under Edward the Second, the Commons began to annex petitions to the bills by which they granted fubfidies: this was the dawn of their legislative authority. Under Edward the Third, they declared they would not, in future, acknowlege any law to which they had not expressly affented. Soon after this, they exerted a privilege in which confifts, at this time, one of the great balances of the Constitution: they impeached, and procured to be condemned, some of the first Ministers of State. Under Henry the Fourth, they refused to grant subfidies before an answer had been given to their petitions. In a word, every event of any confequence was attended with an increase of the power

#### 42 THE CONSTITUTION

power of the Commons; increases indeed but flow and gradual, but which were peaceably and legally effected, and were the more fit to engage the attention of the People, and coalesce with the ancient principles of the Constitution.

Under Henry the Fifth, the Nation was entirely taken up with its wars against France; and in the reign of Henry the Sixth began the fatal contests between the houses of York and Lancaster. The noise of arms alone was now to be heard; during the silence of the laws already in being, no thought was had of enacting new ones; and for thirty years together, England presents a wide scene of slaughter and desorbation.

At length, under Henry the Seventh, who, by his intermarriage with the house of York, united the pretensions of the two families, a general peace was re-established, and the prospect of happier days seemed to open on the Nation. But the long and violent agitation under which it had laboured, was to be followed by a long and painful recovery. Henry, mounting the throne with sword in hand, and in great measure as a Conqueror, had promises to sulfil, as well as injuries to avenge. In the mean time, the People, wearied out by the callamities

lamities they had undergone, and longing only for repose, abhorred even the idea of resistance; so that the remains of an almost exterminated Nobility beheld themselves lest desence-less, and abandoned to the mercy of the Sovereign.

The Commons, on the other hand, accustomed to act only a second part in public assairs, and finding themselves bereft of those who had hitherto been their Leaders, were more than ever assaid to form, of themselves, an opposition. Placed immediately, as well as the Lords, under the eye of the King, they beheld themselves exposed to the same dangers. Like them, therefore, they purchased their personal security at the expence of public liberty; and in reading the history of the two first Kings of the house of Tudor, we imagine ourselves reading the relation given by Tacitus, of Tiberius and the Roman Senate \*,

The time, therefore, feemed to be arrived, at which England must submit, in its turn, to the fate of the other Nations of Europe. All those barriers which it had raised for the defence of its liberty, seemed to have only been able to postpone the inevitable effects of Power.

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<sup>\*</sup> Quanto quis illustrior, tanto magis falsi ac festinantes.

### A THE CONSTITUTION

But the remembrance of their ancient laws, of that great charter so often and so solemnly confirmed, was too deeply impressed on the minds of the English, to be essaced by transitory evils. Like a deep and extensive ocean, which preserves an equability of temperature amidst all the vicissitudes of seasons, England still retained those principles of liberty which were so universally diffused through all orders of the People, and they required only a proper opportunity to manifest themselves.

England, besides, still continued to possess the immense advantage of being one undivided State.

Had it been, like France, divided into several distinct dominions, it would also have had several National Assemblies. These Assemblies, being convened at different times and places, for this and other reasons, never could have acted in concert; and the power of withholding subsidies, a power so important when it is that of disabling the Sovereign and binding him down to inaction, would then have only been the destructive privilege of irritating a Master who would have easily found means to obtain supplies from other quarters.

The different Parliaments or Assemblies of these several States, having thenceforth no means

means of recommending themselves to their Sovereign but their forwardness in complying with his demands, would have vied with each other in granting what it would not only have been fruitless, but even highly dangerous, to refuse. The King would not have failed soon to demand, as a tribute, a gift he must have been confident to obtain; and the outward form of confent would have been left to the People only as an additional means of oppreffing them without danger.

But the king of England continued, even in the time of the Tudors, to have but one Affembly before which he could lay his wants, and apply for relief. How great foever the increase of his power was, a single Parliament alone could furnish him with the means of exercifing it; and whether it was that the members of this Parliament entertained a deep fense of their advantages, or whether private interest exerted itself in aid of patriotism, they at all times vindicated the right of granting, or rather refusing subsidies; and, amidst the general wreck of every thing they ought to have held dear, they at least clung obstinately to the plank which was destined to prove the instrument of their preservation. -nUnUnder Edward the Sixth, the abfurd tyrannical laws against High Treason, instituted under Henry the Eighth, his predecessor, were abolished. But this young and virtuous Prince having soon passed away, the blood-thirsty Mary astonished the world with cruelties, which nothing but the fanaticism of a part of her subjects could have enabled her to execute.

Under the long and brilliant reign of Elizabeth, England began to breathe a-new; and the Protestant religion, being seated once more on the throne, brought with it some more freedom and toleration.

The Star-Chamber, that effectual instrument of the tyranny of the two Henries, yet continued to subsist; the inquisitorial tribunal of the High Commission was even instituted; and the yoke of arbitrary power lay still heavy on the subject. But the general affection of the people for a Queen whose former missortunes had created such a general concern, the imminent dangers which England escaped, and the extreme glory attending that reign, lessend the sense of such exertions of authority as would, in these days, appear the height of Tyranny, and served at that time to justify, as they still do excuse, a Princess whose great talents, though not her principles of

govern-

government, render her worthy of being ranked among the greatest Sovereigns.

Under the reign of the Stuarts, the Nation began to recover from its long lethargy. James the First, a prince rather imprudent than tyrannical, drew back the veil which had hitherto disguised so many usurpations, and made an ostentatious display of what his predecessors had been contented to enjoy.

He was inceffantly afferting, that the authority of Kings was not to be controuled, any more than that of God himself. Like Him, they were omnipotent; and those privileges to which the people so clamorously laid claim, as their inheritance and birthright, were no more than an effect of the grace and toleration of his royal ancestors \*.

Those principles, hitherto only silently adopted in the Cabinet, and in the Courts of Justice, had maintained their ground in consequence of this very obscurity. Being now announced from the Throne, and resounded from the pulpit, they spread an universal alarm. Commerce, besides, with its attendant arts, and above all that of printing, disfused more

<sup>\*</sup> See his Declaration made in Parliament, in the years 1610 and 1621.

falutary notions throughout all orders of the people; a new light began to rise upon the Nation; and the spirit of opposition frequently displayed itself in this reign, to which the English Monarchs had not, for a long time past, been accustomed.

But the storm, which was only gathering in clouds during the reign of James, began to mutter under Charles the First, his successor; and the scene which opened to view, on the accession of that Prince, presented the most formidable aspect.

The notions of religion, by a fingular concurrence, united with the love of liberty: the same spirit which had made an attack on the established faith, now directed itself to politics: the royal prerogatives were brought under the same examination as the doctrines of the Church of Rome had been submitted to; and as a superstitious religion had proved unable to support the test, so neither could an authority pretended unlimitted, be expected to bear it.

The Commons, on the other hand, were recovering from the aftonishment into which the extinction of the power of the Nobles had, at first, thrown them. Taking a view of the state of the Nation, and of their own, they became sensible of their

whole strength; they determined to make use of it, and to repress a power which seemed, for so long a time, to have levelled every barrier. Finding among themselves Men of the greatest capacity, they undertook that important task with method and by constitutional means; and thus had Charles to cope with a whole Nation put in motion and directed by an assembly of Statesmen.

And here we must observe how different were the effects produced in England, by the annihilation of the power of the Nobility, from those which the same event had produced in France.

In France, where, in consequence of the division of the People and of the exorbitant power of the Nobles, the People were accounted nothing, when the Nobles themselves were suppresed, the work was completed.

In England, on the contrary, where the Nobles ever vindicated the rights of the People equally with their own,—in England, where the People had successively acquired most effectual means of influencing the motions of the Government, and above all were undivided, when the Nobles themselves were cast to the ground, the body of the People stood firm, and maintained the public liberty.

The unfortunate Charles, however, was totally ignorant of the dangers which furrounded him. Seduced by the example of the other Sovereigns of Europe, he was not aware how different in reality, his fituation was from theirs: he had the imprudence to exert with rigour an authority which he had no ultimate refources to support; an union was at last effected in the Nation; and he faw his enervated prerogatives diffipated with a breath \*. By the famous act,

\* It might here be objected, that when, under Charles the First, the regal power was obliged to submit to the power of the People, the king possessed other dominions besides England, viz. Scotland and Ireland, and therefore feemed to enjoy the fame advantage as the Kings of France, that of reigning over a divided Empire or Nation. But, to this it is to be answered, that, at the time we mention, Ireland, scarcely civilised, only increased the necessities, and consequently the dependence, of the King : while Scotland, through the conjunction of peculiar circustances, had thrown off her obedience. And though those two States, even at present, bear no proportion to the compact body of the Kingdom of England, and feem never to have been able, by their union with it to procure to the King any dangerous resources, yet, the circumflances which took place in both at the time of the Revolution, or fince, sufficiently prove that it was no unfavourable circumstance to English liberty, that the great crisis of the reign of Charles the First, and the great advance which the Conflitution was to make at that time should precede the period at which the King of England might have been able to call in the affiftance of two other Kingdoms.

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called the Petition of Right, and another posterior act, to both which he affented, the compulfory loans and taxes disguised under the name of Benevolences, were delared to be contrary to law; arbitrary imprisonments, and the exercise of the martial law, were abolished; the Court of High Commission, and the Star-Chamber, were suppreffed \*; and the Constitution, freed from the apparatus of despotic powers with which the Tudors had obscured it, was restored to its ancient lustre. Happy had been the People if their Leaders, after having executed so noble a work, had contented themselves with the glory of being the benefactors of their Country. Happy had been the King, if, obliged at last to submit, his submisfion had been fincere, and if he had become fufficiently fenfible, that the only resource he had left was the affection of his fubjects.

But Charles knew not how to furvive the loss of a power he had conceived to be indisputable: he could not reconcile himself to limitations and restraints so injurious, according to his notions, to

<sup>\*</sup> The Star-Chamber differed from all the other Courts of Law in this: the latter were governed only by the common law, or immemorial custom, and Acts of Parliament; whereas the former often admitted for law the proclamations of the King in Council, and grounded its judgments upon them. The abolition of this Tribunal, therefore, was justly looked upon as a great victory over regal Authority.

fovereign authority. His discourse and conduct betrayed his secret designs; distrust took possession of the Nation; certain ambitious persons availed themselves of it to promote their own views; and the storm, which seemed to have blown over, burst forth anew. The contending fanaticism of persecuting sects, joined in the constitute between regal haughtiness and the ambition of individuals; the tempest blew from every point of the compass; the Constitution was rent asunder, and Charles exhibited in his fall an awful example to the Universe.

The royal power being thus annihilated, the English made fruitless attempts to substitute a republican Government in its stead. " It was a curious spectacle," says Montesquieu, " to behold the vain efforts of the English to " establish among themselves a Democracy." Subjected, at first, to the power of the principal Leaders in the Long Parliament, they faw that power expire, only to pass, without bounds, into the hands of a Protector. They faw it afterwards parcelled out among the Chiefs of different bodies of troops: and thus shifting without end from one kind of fubjection to another, they were at length convinced, that an attempt to establish liberty in a great Nation, by making the people interfere in the common business of Government, is of all attempts the most chimerical; that the authority of all, with which men are amused, is in reality no more than the authority of a sew powerful individuals who divide the Republic among themselves; and they at last rested in the bosom of the only Constitution which is sit for a great State and a free People; I mean that in which a chosen number deliberate, and a single hand executes; but in which, at the same time, the public satisfaction is rendered, by the general relation and arrangement of things, a necessary condition of the duration of Government.

Charles the Second, therefore, was called over; and he experienced on the part of the people, that enthusiasm of affection which usually attends the return from a long alienation. He could not, however, bring himself to forgive them the inexpiable crime of which he looked upon them to have been guilty. He saw with the deepest concern that they still entertained their former notions with regard to the nature of the royal prerogative; and, bent upon the recovery of the ancient powers of the Crown, he only waited for an opportunity to break those promises which had procured his restoration,

But the very eagerness of his measures frustrated their success. His dangerous alliances on the Continent, and the extravagant wars in which he involved England, joined to the frequent abuse he made of his authority, betrayed his designs. The eyes of the Nation were soon opened, and saw into his projects; when, convinced at length that nothing but fixed and irressiftible bounds can be an effectual check on the views and efforts of Power, they resolved finally to take away those remnants of despotism which still made a part of the regal prerogative.

The military services due to the Crown, the remains of the ancient seudal tenures, had been already abolished: the laws against heretics were now repealed: the Statute for holding parliaments once at least in three years was enacted; the Hebeas Corpus Act, that barrier of the Subject's personal safety, was established; and, such was the patriotism of the Parliaments, that it was under a King the most destitute of principle, that liberty received its most efficacious supports.

At length, on the death of Charles, began a reign which affords a most exemplary lesson both to Kings and People. James the Second, a prince of a more rigid disposition, though of a less comprehensive understanding, than his late brother, pursued still more openly the project which had already proved so fatal to his family.

mily. He would not see that the great alterations which had successively been effected in the Constitution, rendered the execution of it daily more and more impracticable: he imprudently suffered himself to be exasperated at a resistance he was in no condition to overcome; and, hurried away by a spirit of despotism and a monkish zeal, he ran headlong against the rock which was to wreck his authority.

He not only used, in his declarations, the alarming expressions of Absolute Power and Unlimited Obedience—he not only usurped to himfelf a right to dispense with the laws; but moreover fought to convert that destructive pretenfion to the destruction of those very laws which were held most dear by the Nation, by endeavouring to abolish a religion for which they had fuffered the greatest calamities, in order to establish on its ruins a mode of faith which repeated Acts of the Legislature had profcribed; and proscribed, not because it tended to establish in England the doctrines of Transubstantiation and Purgatory, doctrines in themselves of no political moment, but because the unlimited power of the Sovereign had always been made one of its principal tenets.

To endeavour therefore to revive such a Religion, was not only a violation of the laws, but

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was, by one enormous violation, to pave the way for others of a still more alarming nature. Hence the English, seeing that their liberty was attacked even in its first principles, had recourse to that remedy which reason and nature point out to the People, when he who ought to be the guardian of the laws becomes their destroyer: they withdrew the allegiance which they had sworn to James, and thought themselves absolved from their oath to a King who himself disregarded the oath he had made to his People,

But, instead of a revolution like that which dethroned Charles the First, which was effected by a great effusion of blood, and threw the state into a general and terrible convulsion, the dethronement of James proved a matter of short and easy operation. In consequence of the progressive information of the People, and the certainty of the principles which now directed the Nation, the whole were unanimous. All the ties by which the People were bound to the throne, were broken, as it were, by one single shock; and James, who, the moment before was a Monarch surrounded by subjects, became at once a simple individual in the midst of the Nation.

That which contributes, above all, to diftinguish this event as singular in the annals of ManMankind, is the moderation, I may even fay, the legality which accompanied it. As if to dethrone a King who fought to fet himself above the Laws, had been a natural consequence of, and provided for, by the principles of Government, every thing remained in its place; the Throne was declared vacant, and a new line of succession was established.

Nor was this all; care was had to repair the breaches that had been made in the Constitution, as well as to prevent new ones; and advantage was taken of the rare opportunity of entering into an original and express compact between King and People.

An Oath was required of the new King, more precise than had been taken by his predecessors; and it was consecrated as a perpetual formula of such oaths. It was determined, that to impose taxes without the consent of Parliament, as well as to keep up a standing army in time of peace, are contrary to law. The power which the Crown had constantly claimed, of dispensing with the laws, was abolished. It was enacted, that the subject, of whatever rank or degree, had a right to present petitions to the King. Lastly,

the

<sup>\*</sup> The Lords and Commons, previous to the Coronation of

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the key-stone was put to the arch, by the final establishment of the Liberty of the Press †.

The Revolution of 1689 is therefore the third grand æra in the history of the Constitution of England. The Great Charter had marked out the limits within which the Royal authority ought to be confined; fome outworks were raised in the reign of Edward the First; but it was at the Revolution that the circumvallation was completed.

It was at this æra, that the true principles of civil fociety were fully established. By the expulsion of a King who had violated his oath, the doctrine of Resistance, that ultimate refource of an oppressed People, was confirmed

of King William and Queen Mary, had framed a Bill which contained a declaration of the rights which they claimed in behalf of the People, and was in confequence called the Bill of Rights. This Bill contained the Articles above, as well as some others, and having received afterwards the Royal assent, became an Act of Parliament, under the title of An AA declaring the Rights and Liberties of the Subject, and settling the Succession of the Grown.—A.

1. William and Mary, Sess. 2. Cap. 2.

+ The liberty of the press was, properly speaking, established only four years afterwards, in consequence of the refusal which the Parliament made at that time to continue any longer the restrictions which had before been set upon it.

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beyond a doubt. By the exclusion given to a family hereditarily despotic, it was finally determined, that Nations are not the property of Kings. The principles of Passive Obedience, the Divine and indeseasible Right of Kings, in a word, the whole scassfolding of salse and superstitious notions by which the Royal authority had till then been supported, sell to the ground, and in the room of it were substituted the more solid and durable soundations of the love of order, and a sense of the necessity of civil government among Mankind.

### CHAP. IV.

# Of the Legislative Power.

I N almost all the States of Europe, the will of the Prince holds the place of law; and custom has so confounded the matter of right with the matter of fact, that their Lawyers generally represent the legislative authority as effentially attached to the character of King; and the plenitude of his power seems to them necessarily to flow from the very definition of his title.

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The English placed in more favourable circumstances, have judged differently: they could not believe that the destiny of Mankind ought to depend on a play of words, and on scholastic subtilities; they have therefore annexed no other idea to the word King, or Roy, a word known also to their laws, than that which the Latins annexed to the word Rex, and the northern Nations to that of Cyning.

In limiting therefore the power of their King, they have acted more consistently with the etymology of the word; they have acted also more consistently with reason, in not leaving the laws to the disposal of the person who is already invested with the public power of the State, that is, of the person who lies under the greatest and most important temptations to set himself above them.

The basis of the English Constitution, the capital principle on which all others depend, is that the Legislative power belongs to Parliament alone; that is to say, the power of establishing laws, and of abrogating, changing, or explaining them,

The constituent parts of Parliament are the King, the House of Lords, and the House of Commons,

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The House of Commons, otherwise the Assembly of the Representatives of the Nation, is composed of the Deputies of the different Counties, each of which sends two; of the Deputies of certain Towns, of which London, including Westminster and Southwark, sends eight—other Towns, two or one; and of the Deputies of the Universities of Oxford and Cambridge, each of which sends two.

Lastly, since the Act of Union, Scotland sends forty-five Deputies; who, added to those just mentioned, make up the whole number of five hundred and sifty-eight. Those Deputies, though separately elected, do not solely represent the Town or County that sends them, as is the case with the Deputies of the United Provinces of the Netherlands, or of the Swiss Cantons; but when they are once admitted, they represent the whole body of the Nation.

The qualifications required for being a Member of the House of Commons are, for reprefenting a County, to be born a subject of Great Britain, and to be possessed of a landed estate of six hundred pounds a year; and of three hundred, for representing a Town, or Borough.

The qualifications required for being an elector in a County, are to be possessed, in

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that County, of a Freehold of forty shillings a year \*. With regard to electors in Towns or Boroughs, they must be Freemen of them, a word which now signifies certain qualifications expressed in the particular Charters.

When the King has determined to affemble a Parliament, he fends an order for that purpose to the Lord Chancellor, who, after receiving the fame, fends a writ under the great feal of England to the Sheriff of every County, directing him to take the necessary steps for the election of Members for the County, and the Towns and Boroughs contained in it. Three days after the reception of the writ, the Sheriff must, in his turn, fend his precept to the Magistrates of the Towns and Boroughs, to order them to make their election within eight days after the reception of the precept, giving four days notice of the same. And the Sheriff himself must proceed to the election for the County, not fooner than ten days after the receipt of the writ, nor later than fixteen.

The principal precautions taken by the law, to infure the freedom of elections, are, that any

This Freehold must have been possessed by the elector one whole year at least before the time of election, except it has devolved to him by inheritance, by marriage, by a last will, or by promotion to an office.

Candidate, who after the date of the writ, or even after the vacancy, shall have given entertainments to the electors of a place, or to any of them, in order to his being elected, shall be incapable of serving for that place in Parliament. That if any person gives, or promises to give any money, employment, or reward, to any voter, in order to influence his vote, he, as well as the voter himself, shall be condemned to pay a fine of five hundred pounds, and for ever disqualified to vote and hold any office in any corporation; the faculty however being reserved to both, of procuring their indemnity for their own offence, by discovering some other offender of the same kind.

It has been moreover established that no Lord of Parliament, or Lord Lieutenant of a County, has any right to interfere in the elections of members; that any officer of the excise, customs, &c. who shall presume to intermeddle in elections, by influencing any voter to give or withhold his vote, shall forfeit one hundred pounds, and be disabled to hold any office. Lastly, all soldiers quartered in a place where an election is to be made, must move from it, at least one day before the election, to the distance of two miles or more, and re-

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turn not till one day after the election is finished.

The House of Peers, or Lords, is composed of the Lords Spiritual, who are the Archbishops of Canterbury and of York, and the twenty-four Bishops; and of the Lords Temporal, whatever may be their respective titles, such as Dukes, Marquises, Earls, &c.

Lastly, the King is the third constitutive part of Parliament: it is even he alone who can convoke it; and he alone can dissolve, or prorogue it. The effect of a dissolution is, that from that moment the Parliament completely ceases to exist; the commission given to the Members by their Constituents is at an end; and whenever a new meeting of Parliament shall happen, they must be elected anew. A prorogation is an adjournment to a term appointed by the King; till which the existence of Parliament is simply interrupted, and the function of the Deputies suspended.

When the Parliament meets, whether it be by virtue of a new summons, or whether, being composed of Members formerly elected, it meets again at the expiration of the term for which it had been prorogued, the King either goes to it in person, invested with the insignia of his dignity, or appoints proper persons to represent him on that occasion, and opens the session by laying before the Parliament the state of the public affairs, and inviting them to take them into consideration. This presence of the King, either real or represented, is absolutely requisite at the first meeting; it is it which gives life to the Legislative Bodies, and puts them in action.

The king having concluded his declaration, withdraws. The Parliament, which is then legally intrusted with the care of the National concerns, enters upon its functions, and continues to exist till it is prorogued, or dissolved. The House of Commons, and that of Peers, assemble separately: the latter, under the presidence of the Lord Chancellor: the former, under that of their Speaker, and both separately adjourn to such days as they respectively think proper to appoint.

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As each of the two Houses has a negative on the propositions made by the other, and there is, consequently, no danger of their encroaching on each other's rights, nor on those of the King, whose has likewise his negative upon them both, any question judged by them conducive to the public good, without exception, may be made the subject of their respec-

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limitations, or extensions, to be given to the authority of the King; the establishing of new laws, or making changes in those already in being. Lastly, the different kinds of public provisions, or establishments, the various abuses of administration, and their remedies, become, in every Session, the object of the attention of Parliament.

Here, however, an important observation must be made. All Bills for granting Money must have their beginning in the House of Commons: the Lords cannot take this object into their consideration but in consequence of a bill presented to them by the latter; and the Commons have at all times been so anxiously tenacious of this privilege, that they have never suffered the Lords even to make any change in the Money Bills which they have sent to them; and the Lords are expected simply and solely either to accept or reject them.

This excepted, every Member, in each House, may propose whatever question he thinks proper. If, after being considered, the matter is found to deserve attention, the person who made the proposition, usually with some others adjoined to him, is desired to set it down in writing. If, after more complete discussions of

the subject, the proposition is carried in the affirmative, it is sent to the other House, that they may, in their turn, take it into consideration. If the other House reject the Bill, it remains without any effect: if they agree to it, nothing remains wanting to its complete establishment, but the Royal Assent.

When there is no business that requires immediate dispatch, the King usually waits till the end of the Session, or at least till a certain number of bills are ready for him, before he declares his royal pleasure. When the time is come, the King goes to Parliament in the same state with which he opened it; and while he is seated on the Throne, a Clerk, who has a list of the Bills, gives, or resuses, as he reads the Royal Assent.

When the Royal Affent is given to a public Bill, the Clerk says, le Roy le veut. If the bill be a private Bill, he says, soit fait comme il est desiré. If the bill has subsidies for its object, he says, Le Roy remercie ses loyaux Sujets, accepte leur bénévolence & aussi le veut. Lastly, if the King does not think proper to assent to the Bill, the Clerk says, le Roy s'avisera; which is a mild way of giving a refusal.

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It is, however, pretty fingular, that the King of England should make use of the French

### THE CONSTITUTION

language to declare his intentions to his Parliament. This cuftom was introduced at the Conquest \*, and has been continued, like other matters of form, which fometimes fublist for ages after the real fubstance of things has been altered; and Judge Blackstone expresses himself, on this fubject in the following words: " A badge, " it must be owned (now the only one remain-" ing), of Conquest; and which one would wish " to fee fall into total oblivion, unless it be re-" ferved as a folemn memento to remind us that " our liberties are mortal, having once been de-

" stroyed by a foreign force."

When the King has declared his different intentions, he prorogues the Parliament. Bills which he has rejected, remain without force: those to which he has affented, become the expression of the will of the highest power acknowledged in England: they have the same binding force as the Edits enrégistrés have

<sup>\*</sup> William the Conqueror added to the other changes he introduced, the abolition of the English language in all public, as well as judicial transactions, and substituted to it the French that was spoken in his time; hence the number of old French words that are met with in the ftyle of the English laws. It was only under Edward III. that the English language began to be re-established in the Courts of Juffice.

in France\*, and as the *Populifcita* had in ancient Rome: in a word, they are Laws. And though each of the conftituent parts of the Parliament might, at first, have prevented the existence of those laws, the united will of all the Three is now necessary to repeal them.

. They call in France, Edits enrégistrés, those Edicts of the King which have been registered in the Court of Parliament. The word Parliament does not, however, express in France, as it does in England, the Assemby of the Estates of the Kingdom. The French Parlemens are only Courts of Justice: that of Paris was instituted in the same manner, and for the same Purposes, as the Aula Regis was afterwards in England, viz. for the administration of public Justice, and for deciding the differences between the King and his Barons: it was in consequence of the Judgments awarded by that Court, that the King proceeded to feize the dominions of those Lords or Princes against whom a sentence had been passed, and when he was able to effect this, united them to the Crown. The Parliament of Paris, as do the other Courts of Law, ground its judgments upon the Edias or Ordonnances of the King, when it has once registered them. When those Ordonnances are looked upon as grievous to the Subject, the Parliament refuses to regifter them; but this they do not from any pretention they have to a share in the Legislative authority; they only object that they are not satisfied that the Ordonnance before them is really the will of the King, and then proceed to make remonstrances against it: sometimes the King defers to these; or if he is resolved to put an end to all opposition, he comes in person to the Parliament, there holds what they. call un Lit de justice, declares that the Ordonnance before. them is actually his will, and orders the proper Officer to register it.

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## CHAP. V.

cient Rome : in a word, they are Laws.

# Of the Executive Power.

WHEN the Parliament is prorogued or diffolved, it ceases to exist; but its laws still continue to be in force: the King remains charged with the execution of them, and is supplied with the necessary power for that purpose.

It is however to be observed that, though in his political capacity of one of the constituent parts of the Parliament, that is, with regard to the share allotted to him in the legislative authority, the King is undoubtedly the Sovereign, and only needs allege his will when he gives or refuses his affent to the bills presented to him; vet, in the exercise of his powers of Government, he is no more than a Magistrate, and the laws, whether those that existed before him, or those to which, by his affent, he has given being, must direct his conduct, and bind him equally with his subjects.

The first prerogative of the King, in his capacity of Supreme Magistrate, has for its object the administration of Justice.

1°. He is the fource of all judicial power in the State; he is the Chief of all the Courts of Law, and the Judges are only his Substitutes; every thing is transacted in his name; the Judgments must be with his Seal, and are executed by his Officers.

2°. By a fiction of the law, he is looked upon as the universal proprietor of the kingdom; he is in consequence deemed directly concerned in all offences; and for that reason prosecutions are to be carried on, in his name, in the Courts of Law.

3°. He can pardon offences, that is, remit the punishment that has been awarded in consequence of his persecution.

II. The second prerogative of the King, is, to be the fountain of bonour, that is, the distributor of titles and dignities: he creates the Peers of the realm, as well as bestows the disferent degrees of inferior Nobility. He moreover disposes of the different offices, either in the Courts of Law, or elsewhere.

III. The King is the fuperintendent of Commerce; he has the prerogative of regulating weights and measures; he alone can coin money, and can give a currency to foreign coin.

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IV. He is the Supreme Head of the Church, In this capacity he appoints the Bishops, and

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the two Archbishops; and he alone can convene the Assembly of the Clergy. This Assembly is formed, in England, on the model of the Parliament; the Bishops form the upper House: Deputies from the Dioceses, and from the several Chapters, form the lower House; the affent of the King is likewise necessary to the validity of their Acts, or Canons; and the King can prorogue, or dissolve, the Convocation.

V. He is, in right of his Crown, the Generalissimo of all sea or land forces whatever; he alone can levy troops, equip sleets, build fortresses, and fill all the posts in them.

VI. He is, with regard to foreign Nations, the representative and the depository, of all the power and collective majesty of the Nation: he sends and receives ambassadors; he contracts alliances; and has the prerogative of declaring war, and of making peace, on whatever conditions he thinks proper.

VII. In fine, what feems to carry fo many powers to the height, is, its being a fundamental maxim, that THE KING CAN DO NO WRONG: which does not fignify, however, that the King has not the power of doing ill, or, as it was pretended by certain persons in former times that every thing he did was lawful; but only that he is above the reach of all Courts of

law whatever, and that his person is sacred and inviolable,

### CHAP. VI.

The Boundaries which the Constitution has set to the Royal Prerogative.

IN reading the foregoing enumeration of the powers with which the laws of England have intrusted the King, we are at a loss to reconcile them with the idea of a Monarchy, which, we are told, is limited. The King not only unites in himself all the branches of the Executive power,-he not only disposes, without controul, of the whole military power in the State,but he is moreover, it feems, Master of the Law itself, fince he calls up, and dismisses, at his will, the Legislative Bodies. We find him, therefore, at first fight, invested with all the prerogatives that ever were were claimed by the most absolute Monarchs; and we are at a loss to find that liberty which the English seem so consident they possess.

But the Representatives of the people still have, and that is saying enough, they still have in their hands, now that the Constitution is sully established, the same powerful weapon which

This is the case of the King of England. He has, in that capacity, and without the grant of his people, scarcely any revenue. A few hereditary duties on the exportation of wool, which (fince the establishment of manufactures) are become tacitly extinguished; a branch of the excise which, under Charles the Second, was annexed to the Crown as an indemnification for the military fervices it gave up, and which under George the First, has been fixed to seven thousand pounds; a duty of two shillings on every ton of wine imported; the wrecks of ships of which the owners remain unknown; whales and flurgeons thrown on the coast; swans swimming on public rivers; and a few other feudal relics, now compose the whole appropriated revenue of the King, and are all that remains of the ancient inheritance of the Crown.

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The King of England, therefore, has the prerogative of commanding armies, and equipping fleets-but without the concurrence of his Parliament he cannot maintain them. He can bestow places and employments-but without his Parliament he cannot pay the falaries attending on them. He can declare war, -but without his Parliament it is impossible for him to carry it on. In a word, the Royal Prerogative, distitute as it is of the power of imposing taxes, is like a vast body, which cannot of itself accomplish its motions; or, if you please, it is like a ship completely equipped, but from which the Parliament can at pleasure draw off the water, aud leave it aground,-and also set it afloat again, by granting subsidies.

And indeed we see, that since the establishment of this right of the Representatives of the People, to grant, or resuse, subsidies to the Crown, their other privileges have been continually increasing. Though these Representatives were not, in the beginning, admitted into Parliament but upon the most disadvantageous terms, yet they soon sound means, by joining petitions to their money bills, to have a share in framing those laws by which they were in suture to be governed; and this method of proceeding, which at first was only tolerated

by the King, they afterwards coverted into an express right, by declaring, under Henry the Fourth, that they would not, thenceforward, come to any resolutions with regard to subsidies, before the King had given a precise answer to their

petitions.

In subsequent times we see the Commons constantly successful, by their exertions of the same privilege, in their endeavours to lop off the despotic powers which still made a part of the regal prerogative. Whenever abuses of power had taken place, which they were seriously determined to correct, they made grievancies and supplies, to use the expression of Sir Thomas Wentworth, go band in band together, which always produced the redress of them. And in general, when a bill, in consequence of its being judged by the Commons essential to the public welfare, has been joined by them to a money bill, it has seldom failed to pass in that agreeable company \*.

\* In mentioning the forcible use which the Commons have at times made of their power of granting subsidies, by joining provisions of a different nature to bills that had grants for their object, I only mean to thew the great efficiency of that power, which was the subject of this Chapter, without pretending to say any thing as to the propriety of the measure. The House of Lorda

#### CHAP. VII.

The same Subject continued.

BUT this force of the prerogative of the Commons, and the facility with which it may be exerted, however necessary they may have been for the first establishment of the Constitution, might prove too considerable at present, when it is requisite only to support it. There might be the danger, that, if the Parliament should ever exert their privilege to its full extent, the Prince, reduced to despair, might resort to satal extremities; or that the Constitution, which subsists only by virtue of its equilibrium, might in the end be subverted.

Indeed this is a case which the prudence of Parliament has foreseen. They have, inth is respect, imposed laws upon themselves; and without touching the prerogative itself, they

Lords have even found it necessary (which confirms what is said here) to form, as it were, a confederacy among themselves, for the security of their Legislative authority, against the unbounded use which the Commons might make of their power of taxation; and it has been made a standing order of their House, to reject any bill whatsoever to which a money-bill has been tacked.

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have moderated the exercise of it. A custom has for a long time prevailed, at the beginning of every reign, and in the kind of overslowing of affection which takes place between a King and his first Parliament, to grant the King a revenue for his life; a provision which, with respect to the great exertions of his power, does not abridge the influence of the Commons, but yet puts him in a condition to support the dignity of the Crown, and affords him, who is the first Magistrate in the Nation, that independence which the laws insure also to those Magistrates who are particularly intrusted with the administration of Justice.

This conduct of the Parliament provides an admirable remedy for the accidental diforders of the State. For though, by the wife diffri-

The twelve Judges.—Their commissions, which in former times were often given them durante bene placito, now must always "be made quamdin so bene gesserint, and "their salaries ascertained: but upon an address of both "Houses it may be lawful to remove them."—Stat. 13 Will. III. c. 2. In the sirst year of the reign of his present Majesty, it has been moreover enacted, that the commissions of the Judges shall continue in force, notwithstanding the demise of the King: which has prevented their being dependent, with regard to their continuation in office, on the heir apparent.

bution of the powers of Government, great usurpations are become in a manner impracticable, nevertheless it is impossible but that, in confequence of the continual, though filent efforts of the Executive power to extend itself, abuses will at length slide in. But here the powers, wifely kept in referve by the Parliament, afford the means of remedying them. At the end of each reign, the civil lift, and confequently that kind of independence which it procured, are at an end. The successor finds a Throne, a Sceptre, and a Crown; but he finds neither power, nor even dignity; and before a real possession of all these things is given him, the Parliament have it in their power to take a thorough review of the State, as well as correct the feveral abuses that may have crept in during the preceding reign: and thus the Constitution may be brought back to its first principles. As of the sound at as it

England, therefore, by this means, enjoys one very great advantage, one that all free States have fought to procure for themselves; I mean that of a periodical reformation. But the expedients which Legislators have contrived for this purpose in other Countries, have always, when attempted to be carried into practice, been found to be productive of very disadvan-

tageous

But the means of reformation which the Parliament of England has taken care to referve to itself, is the more effectual, as it goes less directly to its end. It does not oppose the usurpations of prerogative, as it were, in front—it does not encounter it in the middle of its career, and in the fullest flight of its exertion: but it goes in learch of it to its source, and to the principal of its action. It does not endeavour forcibly to overthrow it; it only enervates its springs.

What increases still more the mildness of the operation, is, that it is only to be applied to the usurpations themselves, and passes by, what would be far more formidable to encounter, the obstinacy and pride of the usurpers.

Every thing is transacted with a new Sovereign, who, till then, has had no share in public affairs, and has taken no step which he may conceive himself bound in honour to support. In fine, they do not wrest from him what the good of the State requires he should give up: he himself makes the facrifice.

The truth of all these observations is remarkably confirmed by the events that followed the reign of the two last Henries. Every barrier that protected the People against the excursions of Power had been broke through. The Parliament, in their terror, had even enacted that proclamations, that is the will of the King, should have the force of laws \*: the Constitution seemed really undone. Yet, on the first opportunity afforded by a new reign, liberty began again to make its appearance †. And when the Nation, at length recovered from its long supineness, had, at the accession of Charles the First, another opportunity of a change of Sovereign, that enormous mass of abuses, which had been accumulat-

<sup>\*</sup> Stat. 31 Hen. VIII. chap. 8.

<sup>†</sup> The laws concerning Treason, passed under Henry the Eighth, which Judge Blackstone calls "an amazing heap of "wild and new-fangled treasons," were, together with the statute just mentioned, repealed in the beginning of the reign of Edward VI.

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ing, or gaining strength, during five successive reigns, was removed, and the ancient laws were restored.

To which add, that this fecond reformation, which was so extensive in its effects, and might be called a new creation of the Constitution, was accomplished without producing the least convulsion. Charles the First, in the same manner as Edward had done in former times \*, assented to every regulation that was passed; and whatever reluctance he might at first manifest, yet the Act called the Petition of Right (as well as the Bill which afterwards completed the work) received the Royal Sanction without bloodshed.

It is true, great misfortunes followed; but they were the effects of particular circumstances. During the time which preceded the reign of the Tudors, the nature and extent of regal authority having never been accurately defined, the exorbitant power of the Princes of that House had gradually introduced political prejudices of even an extravagant kind: those prejudices, having had a hundred and fifty years to take root, could not be shaken off but by a kind of general con-

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<sup>•</sup> Or, which is equally in point, the Duke of Somerfet his uncle, who was the Regent of the Kingdom, under the name of Protector.

vullion; the agitation continued after the action, and was carried to excess by the religious quarrels that arose at that time.

## CHAP. VIII.

# New Restrictions.

THE Commons, however, have not entirely relied on the advantages of the great prerogative with which the Constitution has intrusted them.

Though this prerogative is, in a manner, out of danger of an immediate attack, they have nevertheless shewn at all times the greatest jealousy on its account. They never suffer, as we have observed before, a money-bill to begin any where but with themselves; and any alteration that may be made in it, in the other House, is sure to be rejected. If the Commons had not most strictly reserved to themseves the exercise of a prerogative on which their very existence depends, the whole might at length have slidden into that other body, which they might have suffered to share in it equally with them. If any other persons besides the representatives of the people had a right to make an offer of the produce of the labour of the

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people, the executive Power would foon have forgot, that it only exists for the advantage of the public \*.

Besides,

• As the Crown had the undisputed prerogative of assenting to, and dissenting from, what bills it thinks proper, as well as of convening, proroguing, and dissolving the Parliament, whenever it pleases, the latter have no assurance of having a regard paid to their Bills, or even of being allowed to assemble, but what may result from the need the Crown stands in of their assistance: the danger, in that respect, is even greater for the Commons than for the Lords, who enjoy a dignity which is hereditary, as well as inherent to their persons, and form a permanent Body in the State; whereas the Commons completely vanish, whenever a dissolution takes place: there is, therefore, no exaggeration in what has been said above, that their very being depends on their power of granting subsidies to the Crown.

Moved by these considerations, and no doubt by a sense of their duty towards their Constituents, to whom this right of taxation originally belongs, the House of Commons have at all times been very careful lest precedents should be established, which might, in the most distant manner, tend to weaken that right. Hence the warmth, I might say the resentment, with which they have always rejected even the amendments proposed by the Lords in their Money Bills, The Lords, however, have not given up their pretension to make such amendments; and it is only by the vigilance and constant pre-determination of the Commons to reject all alteration whatever made in their Money Bills, without even examining them, that this pretension of the Lords is reduced to be an useless, and only dormant, claim. The first instance

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Besides, though this prerogative has of itself, we may say, an irresistible efficiency, the Parliament has neglected nothing that may increase it, or at least the facility of its exercise; and though they have allowed the general prerogatives of the Sovereign to remain undisputed, they have in several cases endeavoured to restrain the use he might make of them, by entering with him into divers express and solemn conventions for that purpose †.

Thus, the King is indisputably invested with the exclusive right of assembling Parliaments: yet he must assemble one, at least once in three years; and this obligation on the King, which was, we find, insisted upon by the People in very early times, has been since confirmed by an act passed in the sixteenth year of the reign of Charles the Second.

Moreover, as the most fatal consequences might ensue, if laws which might most materially

of a misunderstanding between the two Houses, on that account, was in the year 1671; and the reader may see at length, in Vol. I. of the Debates of the House of Commons, the reasons that were at that time alledged on both sides.

† Laws made to bind such Powers in a State, as have no perior power by which they may be legally compelled to the execution of them (for instance, the Crown, as circumstanced in England) are nothing more than general conventions, or treaties, made with the Body of the People.

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affect public liberty, could be enacted in Parliaments abruptly and imperfectly summoned, it has been established that the Writs for affembling a Parliament must be issued forty days at least before the first meeting of it. Upon the same principle it has also been enacted, that the King cannot abridge the term he has once fixed for a prorogation, except in the two following cases, viz. of a rebellion, or of imminent danger of a soreign invasion; in both which cases a sourteen days notice must be given \*.

Again, the King is the head of the Church; but he can neither alter the established religion, or call individuals to an account for their religious opinions †. He cannot even profess the religion which the Legislature has particularly forbidden; and the Prince who should profess it, is declared incapable of inheriting, possessing or enjoying, the Crown of these Kingdoms ‡.

The King is the first Magistrate; but he can make no change in the maxims and forms confecrated by law or custom; he cannot even in-

<sup>\*</sup> Stat. 30 Geo. II. c. 25.

<sup>+</sup> The Convocation, or affembly of the Clergy, of which the King is the head, can only regulate such affairs as are merely ecclesiastical; they cannot touch the Laws, Customs, and Statutes, of the Kingdom.—Stat. 25 Hen. VIII. c. 19.

<sup>1 1</sup> Will. and M. Stat. 2. c. 2.

fluence, in any case whatever, the decision of causes between subject and subject; and James the First, affisting at the Trial of a cause, was reminded by the Judge, that he could deliver no opinion . Lastly, though crimes are profecuted in his name, he cannot refuse to lend it to any particular persons who have complaints to prefer.

The King has the privilege of coining money; but he cannot alter the standard.

The King has the power of pardoning offenders; but he cannot exempt them from making. a compensation to the parties injured. It is even established by law, that, in a case of murder, the widow, or next heir, shall have a right to profecute the murderer; and the King's pardon, whether it preceded the Sentence passed in confequence of fuch profecution, or whether it be granted after it, cannot have any effect +.

The

<sup>\*</sup> These principles have since been made an express article of an Act of Parliament; the same which abolished the Star-Chamber. " Be it likewise declared and enacted, by " the authority of this present Parliament, That neither his " Majesty, nor his Privy Council, have, or ought to have se any jurisdiction, power or authority, to examine or draw " into question, determine, or dispose of the lands, tenements, " goods, or chattels, of any of the subjects of this Kingse dom."-Stat. A. 16. Ch. I. cap. 10. § 10.

<sup>†</sup> The method of profecution mentioned here, is called

The King has the military power; but still with respect to this, he is not absolute. It is true, in regard to the sea-forces, as there is in them this very great advantage, that they cannot be turned against the liberty of the Nation, at the same time that they are the furest bulwark of the island, the King may keep them as he thinks proper; and in this respect he lies only under the general restraint of applying to Parliament for obtaining the means of doing it. But in regard to land forces, as they may become an immediate weapon in the hands of Power, for throwing down all the barriers of public liberty, the King cannot raife them without the confent of Parliament. The Guards of Charles the Second were declared anti-conftitutional\*; and James's army was one of the causes of his being dethroned +.

In these times, however, when it is become a custom with Princes to keep those numerous armies which serve as a pretext and means of

an Appeal; it must be sued within a year and a day after the completion of the crime,

<sup>•</sup> He had carried them to the number of four thousand.

<sup>†</sup> A new fanction has been given to the above restriction in the fixth Article of the Bill of Rights: " A standing army, without the consent of Parliament, is against law."

oppressing the People, a State that would maintain its independence, is obliged, in a great measure, to do the same. The Parliament has therefore thought proper to establish a standing body of troops, which amounts to about thirty thousand Men, of which the King has the command.

But this army is only established for one year; at the end of that term, it is (unless reestablished) to be ipso fatto disbanded; and as the question which then lies before Parliament, is not, whether the army shall be dissolved, but whether it shall be established anew, as if it had never existed, any one of the three branches of the Legislature may, by its dissent, hinder its continuance.

Besides, the funds for the payment of this body of troops are to be raised by taxes that never are established for more than one year \*; and it becomes likewise necessary, at the end of this term again to establish them †. In a word, this instrument of desence, which the circum-

**stances** 

<sup>.</sup> The land-tax, and malt-tax.

<sup>†</sup> It is also necessary that the Parliament, when they renew the Ast called the Mutiny Ast, should authorise the different Courts Martial to punish military offences, and desertion. It can therefore refuse the King even the necessary power of military discipline.

stances of modern times have caused to be judged necessary, being capable, on the other hand, of being applied to the most dangerous purposes, has been joined to the State by only a standar thread, the knot of which may be slipped, on the first appearance of danger.

But

To these laws, or rather conventions, between King and People, I shall add here the Oath which the King takes at his Coronation; a compact which, if it cannot have the same precision as the laws we have related above, yet in a manner comprehends them all, and has the farther advantage of being declared with more solemnity.

"The arcbbishop or bishop shall say, Will you solemnly pro"mise and swear to govern the people of this Kingdom of
"England, and the dominions thereto belonging, according to the Statutes of Parliament agreed on, and the
"laws and customs of the same?—The king or queen shall
"say, I solemnly promise so to do.

" law and justice, in mercy, to be executed in all your judgments?—King or queen. I will,

"Arcbbishop or bishop. Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and the protestant reformed religion established by "the law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them?—King or queen. All this I promise to do.

" After this the king or queen, laying his or her hand upon the boly gospels, shall say, The things which I have here before

But these laws which limit the King's authority, would not, of themselves, have been sufficient. As they are, after all, only intellectual barriers, which it is possible that the King might not at all times respect, as the check which the Commons have on his proceedings, by a refufal of fublidies, affects too much the whole State, to be exerted on every particular abuse of his power; and lastly, as even this means might in fome degree be eluded, either by breaking the promifes which have procured fubfidies, or by applying them to uses different from those for which they were appointed, the Constitution has befides supplied the Commons with a means of immediate opposition to the misconduct of Government, by giving them a right to impeach the Ministers.

It is true, the King himself cannot be arraigned before Judges; because if there were any that could pass sentence upon him, it would be they, and not he, who must finally possess the executive power: but, on the other hand, the King cannot act without Ministers; it is therefore those Ministers, that is, those indispensible instruments, whom they attack.

" God. And then shall kifs the book."

<sup>&</sup>quot; before promifed I will perform and keep: fo help me

If, for example, the public money has been employed in a manner contrary to the declared intention of those who granted it, an impeachment may be brought against those who had the management of it. If any abuse of power is committed, or in general any thing done contrary to the public weal, they prosecute those who have been either the instruments, or the advisers of the measure.

But who shall be the Judges to decide in such a cause? What Tribunal will flatter itself, that it can give an impartial decision, when it shall see, appearing at its bar, the Government itself as the accused, and the Representatives of the People, as the accusers?

It is before the House of Peers that the Law has directed the Commons to carry their accufation; that is, before Judges whose dignity,
on the one hand, renders them independent,
and who, on the other, have a great honour
to support in that awful function where they
have all the Nation for spectators of their
conduct.

<sup>\*</sup> It was upon these principles that the Commons, in the beginning of this century, impeached the Earl of Oxford, who had advised the Treaty of Partition, and the Lord Chancellor Somers, who had affixed the great seal to it.

When the impeachment is brought to the Lords, they commonly order the person accused to be imprisoned. On the day appointed, the Deputies of the House of Commons, with the person impeached, make their appearance: the impeachment is read in his presence; Counsel are allowed him, as well as time, to prepare for his desence; and at the expiration of this term, the trial goes on from day to day, with open doors, and every thing is communicated in print to the public.

But whatever advantage the law grants to the person impeached for his justification, it is from the intrinsic merits of his conduct that he must draw his arguments and proofs. It would be of no service to him, in order to justify a criminal conduct, to allege the commands of the Sovereign; or, pleading guilty with respect to the measures imputed to him, to produce the Royal pardon. It is against the Administra-

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there asyriled to the public opt.

This point in ancient times was far from being clearly fettled. In the year 1678, the Commons having impeached the Earl of Danby, he pleaded the King's pardon in bar to that impeachment: great altercations ensued on that subject, which were terminated by the dissolution of that Parliament. It has been since enacted, (Stat. 12 and 13 W. III. c. 2.) " that no pardon under the great seal can

tion itself that the impeachment is carried on; it should therefore by no means interfere: the King can neither stop nor suspend its course, but is forced to behold, as an inactive spectator, the discovery of the share which he may himself have had in the illegal proceedings of his servants, and to hear his own sentence in the condemnation of his Ministers.

An admirable expedient! which, by removing and punishing corrupt Ministers, affords an immediate remedy for the evils of the State, and strongly marks out the bounds within which Power ought to be confined: which takes away the scandal of guilt and authority united, and calms the people by a great and awful act of Justice: an expedient, in this respect especially, so highly useful, that it is to the want of the like, that Machiavel attributes the ruin of his Republic.

" be pleaded in bar to an impeachment by the House of "Commons."

I once asked a Gentleman very learned in the laws of this Country, if the King could remit the punishment of a Man condemned in consequence of an impeachment of the House of Commons; he answered me, the Tories will tell you the King can, and the Whigs he cannot.—But it is not perhaps very material that the question should be decided: the great public ends are attained when a corrupt Minister is removed with disgrace, and the whole System of his proceedings unveiled to the public eye.

But all these general precautions to secure the rights of the Parliament, that is, those of the Nation itself, against the efforts of the executive Power, would be vain, if the Members themselves remain personally exposed to them. Being unable openly to attack, with any safety to itself, the two legislative bodies, and by a forcible exertion of its prerogatives, to make, as it were, a general assault, the executive power might, by subdividing the same prerogatives, gain an entrance, and sometimes by interest, and at others by fear, guide the general will, by instruction of individuals.

But the laws which so effectually provide for the fafety of the People, provide no less for that of the Members, whether of the House of Peers, or that of the Commons. There are not known in England, either those Commissaries, who are always ready to find those guilty whom the wantonness of ambition points out, nor those secret imprisonments which are, in other Countries, the usual expedients of Government. As the forms and maxims of the Courts of Justice are strictly prescribed, and every individual has an invariable right to be judged according to Law, he may obey without fear the dictates of public virtue. Lastly, what crowns all these precautions, is its being a fundafundamental maxim, "That the freedom of feech, and debates and proceedings in Parliament, ought not to be impeached or questioned ed in any Court or place out of Parliament."

The legislators, on the other hand, have not forgot that interest, as well as fear, may impose filence on duty. To prevent its effects, it has been enacted, that all persons concerned in the management of any taxes created fince 1692, commissioners of prizes, navy, victualling-office, &c. commptrollers of the army accounts, agents for regiments, the clerks in the different offices of the revenue, any persons that hold any new office under the Crown, created fince 1705, or having a pension under the Crown, during pleasure, or for any term of years, are incapable of being elected Members. Besides, if any Member accepts an office under the Crown, except it be an officer in the army or navy accepting a new commission, his feat becomes void; though fuch Member is capable of being re-elected.

Such are the precautions hitherto taken by the Legislators, for preventing the undue influence of the great prerogative of disposing of rewards

and free

Bill of Rights. Art. 9.

and places: precautions which have been successively taken, according as circumstances have shewn them to be necessary; and which we may thence suppose, are owing to causes powerful enough to produce the establishment of new ones, whenever circumstances shall point out the necessity of them \*.

Nothing can be a better proof of the efficacy of the causes that produce the liberty of the English, and which will be explained hereafter, than those victories which the Parliament from time to time gains over itself, and in which the Members, forgetting all views of private ambition, only think of their interest as subjects.

Since this was first written, an excellent regulation has been made for the decision of controverted electious. Formerly the House decided them in a very summary manner, and the witnesses were not examined upon oath. But, by an act passed a few years ago, the decision is now to be lest to a Jury, or Committee, of fifteen Members, formed in the following manner. Out of the members present, who must not be less than one hundred, forty-nine are drawn by lots: out of these, each Candidate strikes off one alternately. till there remain only thirteen, who, with two others, named out of the whole House, one by each Candidate, are to form the Committee: in order to secure the necessary number of a hundred Members, all other business in the House is to be suspended, till the above operations are completed.

# CHAP. IX.

Of private Liberty or the Liberty of Individuals.

liberty, that is of the rights of the Nation as a Nation, and of its share in the Government. It now remains that we should treat particularly of a thing without which this general liberty, being absolutely frustrated in its object, would be only a matter of ostentation, and even could not long subsist, I mean the liberty of individuals.

Private Liberty, according to the division of the English Lawyers, consists, first, of the right of *Property*, that is of the right of enjoying exclusively the gifts of fortune, and all the various fruits of one's industry. Secondly, of the right of *Personal Security*. Thirdly, of the *Locomotive Faculty*, taking the word Liberty in its more confined sense.

Each of these rights, say again the English Lawyers, is inherent in the person of every Englishman: they are to him as an inheritance, and he cannot be deprived of them, but by virtue of a sentence passed according to the laws of the land.

And,

And, indeed, as this right of inheritance is expreffed in English by one word (birth-right), the same as that which expresses the King's title to the Crown, it has, in times of oppression, been often opposed to him as a right, doubtless of less extent, but of a sanction equal to that of his own.

One of the principal effects of the right of Property is, that the King can take from his subjects no part of what they posses; he must wait till they themselves grant it him: and this right, which, as we have seen before, is, by its consequences, the bulwark that protects all the others, has moreover the immediate effect of preventing one of the chief causes of oppression.

In regard to the attempts to which the right of property might be exposed from one individual to another, I believe I shall have said every thing, when I have observed, that there is no Man in England who can oppose the irresistible power of the Laws,—that, as the Judges cannot be deprived of their employments but on an accusation by Parliament, the effect of interest with the Sovereign, or with those who approach his person, can scarcely influence their decisions,—that, as the Judges themselves have no power to pass sentence till the matter of sact has been settled by men nominated, we may almost say, at the

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common choice of the parties \*, all private views, and confequently all respect of persons, are banished from the Courts of Justice. However, that nothing may be wanting which may help to throw light on the subject I have undertaken to treat, I shall relate, in general, what is the law in civil matters, that has taken place in England.

When the Pandects were found at Amalphi, the Clergy, who were then the only Men that were able to understand them, did not neglect that opportunity of increasing the influence they had already obtained, and caused them to be received in the greater part of Europe. England, which was destined to have a Constitution so different from that of other States, was to be farther distinguished by its rejecting the Roman Laws.

Under William the Conqueror, and his immediate fucceffors, a multitude of foreign Ecclefiaftics flocked to the Court of England. Their influence over the mind of the Sovereign, which, in the other States of Europe, as they were then conftituted, might be confidered as matter of no great importance, was not so in a Country where the Sovereign being all-powerful, to obtain influence over him, was to obtain power itself. The

<sup>\*</sup> Owing to the extensive right of challenging jurymen, which is allowed to every person brought to his trial, though not very frequently used.

English Nobility saw with the greatest jealousy, Men of a condition so different from their own, vested with a power to the attacks of which they were immediately exposed, and thought that they would carry that power to the height, if they were ever to adopt a system of laws which those same men sought to introduce, and of which they would necessarily become both the depositaries and the interpreters.

It happened, therefore, by a fomewhat fingular conjunction of circumstances, that, to the Roman laws, brought over to England by Monks, the idea of ecclesiastical power became associated, in the same manner as the idea of regal Despotism became afterwards annexed to the Religion of the same Monks, when savoured by Kings who endeavoured to establish an arbitrary government. The Nobility at all times rejected these laws, even with a degree of ill humour in and the usurper Stenario

The nobility, under the reign of Richard II. declared in the French language of those times, "Purce que le roialme d'Engleterre n'étoit devant ces heures, me a l'en tent du Roy notre Seignior, & Seigniors du Parlement, unques ne sera, rulé ne governé par la ley civil." viz. Inasmuch as the Kingdom of England was not before this time, nor according to the intent of the King our Lord, and Lords of Parliament, ever shall be ruled or governed by the civil law—In Rich. Parlamento Westmonasterii, Feb. 3. Anno 2.

phen, whose interest it was to conciliate their affections, went so far as to prohibit the study of them.

As the general disposition of things brought about, as hath been above observed, a sufficient degree of intercourse between the Nobility or Gentry, and the People, the aversion to the Roman Laws gradually spread itself far and wide; and those laws, to which their wisdom in many cases, and particularly their extensiveness, ought naturally to have procured admitance when the English laws themselves were as yet but in their infancy, experienced the most steady opposition from the Lawyers, and as those persons who sought to introduce them, frequently renewed their attempts, there at length arose a kind of general combination amongst the Laity, to confine them to Universities and Monasteries.

This

• It might perhaps be shewn, if it belonged to the subject, that the liberty of thinking in religious matters, which has at all times remarkably prevailed in England, is owing to much the same causes as its political liberty: both perhaps are owing to this, that the same Men, whose interest it is in other Countries that the people should be influenced by prejudices of a political or religious kind, have been in England forced to inform and unite with them. I shall here take occasion to observe, in answer to the reproach made to the English, by President Henault, in his much esteemed Chronological History of France, that the frequent changes of religion which have taken place in England, do not argue any service disposition in the people; they only prove the

This opposition was carried so far, that Fortescue, Chief Justice of the King's Bench, and afterwards Chancellor under Henry VI. wrote a Book intiled De Laudibus Legum Angliæ, in which he proposes to demonstrate the superiority of the English laws over the Civil; and that nothing might be wanting in his arguments on that subject, he gives them the advantage of superior antiquity, and traces their origin to a period much anterior to the soundation of Rome.

This spirit has been preserved even to much more modern times; and when we peruse the many paragraphs which Judge Hale has written in his History of the Common Law, to prove, that in the sew cases in which the Civil Law is admitted in England, it can have no power by virtue of any deserence due to the orders of Justinian (a truth which certainly had no need of proof), we plainly see that this Chief Justice, who was also a very great Lawyer, had, in this respect, retained somewhat of the heat of party.

Even at present the English Lawyers attribute the liberty they enjoy, and of which other Nations

equilibrium between the then existing Sects: there was none but what might become the prevailing one, whenever the Sovereign thought proper to declare for it; and it was not England, as people may think at first fight; it was only its Government, which changed its religion.

are deprived, to their having rejected, while those Nations have admitted, the Roman law; which is miltaking the effect for the cause. It is not because the English have rejected the Roman laws that they are free: but it is because they were free, or at least because there existed among them causes which were, in process of time, to make them fo, that they have been able to reject the Roman laws. But even though they had admitted those laws, the same circumflances that have enabled them to reject the whole, would have likewise enabled them to reject those parts which might not have fuited them; and they would have feen, that it is very possible to receive the decisions of the Civil law on the subject of the servitutes urbana & rustica, without adopting its principles with respect to the power of the Emperors .

Of this the Republic of Holland, where the Civil law is adopted, would afford a proof, if there were not the still more striking one, of the Emperor of Germany, who, though in the opinion of his People, he is the successor to the very throne of the Casars +, has not by a great

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<sup>\*</sup> What particularly frightens the English Lawyers is L. i. Lib. I. Tit. 4. Dig.—Quod Principi placuerit legis habet vigorem.

<sup>+</sup> The German word to express the Emperor's dignity, is, Casar, Kaiser.

deal so much power as a King of England; and the reading of the several treaties which deprived him of the power of nominating the principal offices of the Empire, sufficiently shews that a spirit of unlimited submission to Monarchical power, is no necessary consequence of the admission of the Roman Civil Law.

The Laws therefore that have taken place in England, are what they call the Unwritten Law, also termed the Common Law, and the Statute Law.

The Unwritten Law is thus called, not because it is only transmitted by tradition from generation to generation; but because it is not founded on any known act of the Legislature. It receives its force from immemorial custom, and, for the most part, derives its origin from Acts of Parliament enacted in the times which immediately followed the Conquest (particularly those anterior to the time of Richard the First), the originals of which are lost.

The principal objects fettled by the Common Law, are the rules of descent, the different methods of acquiring property, the various forms required for rendering contracts valid; in all which points it differs, more or less, from the Civil Law. Thus, by the Common Law, lands descend to the eldest son, to the exclusion of all

his brothers and fifters; whereas, by the Civil Law, they are equally divided between all the children: by the Common Law, property is transferred by writing; but by the Civil Law, tradition, or actual delivery, is moreover requifite, &c.

The fource from which the decisions of the Common Law are drawn, is what is called prateritorum memoria eventorum, and is found in the collection of judgments that have been passed from time immemorial, and which as well as the proceedings relative to them, are carefully preferved under the title of Records. In order that the principles established by such a series of judgments may be known, extracts from them are, from time to time, published under the name of Reports; and these reports reach, by a regular series, so far back as the reign of Edward the Second, inclusively.

Besides this collection, which is pretty voluminous, there are also some ancient Authors of great authority among Lawyers; such as Glanvil, who wrote under the reign of Henry the Second—Bratton, who wrote under Henry the Third—Fleta, and Lyttelton. Among more modern Authors, is Sir Edward Coke, Lord Chief Justice of the King's Bench under James the First, who has

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has written four books of Institutes, and is at prefent the Oracle of the Common Law.

The Common Law moreover comprehends fome particular customs, which are fragments of the ancient Saxon laws, escaped from the disaster of the Conquest; such as that called Gavelkind, in the County of Kent, by which lands are divided equally between the Sons; and that called Borough English, by which, in some particular districts, lands descend to the youngest Son.

The Civil Law, in the few instances where it is admitted, is likewise comprehended under the Unwritten Law, because it is of force only so far as it has been authorised by immemorial custom. Some of its principles are followed in the Ecclesiastical Courts, in the Courts of Admiralty, and in the Courts of the two Universities; but it is there nothing more than lex sub lege graviori; and these different Courts must conform to Acts of Parliament, and to the sense given to them by the Courts of Common Law; being moreover subjected to the controul of these latter.

Lastly, the Written Law is the collection of the various Acts of Parliament, the originals of which are carefully preserved, especially since the reign of Edward the Third. Without entering into the distinctions made by Lawyers with respect to them, such as public and private Acts, declaratory

Acts, or such as are made to extend or restrain the Common Law, it will be sufficient to observe, that being the result of the united wills of the Three Constituent Parts of the Legislature, they, in all cases, supercede both the Common Law and all former Statutes, and the Judges must take cognizance of them, and decide in conformity to them, even though they had not been alledged by the parties. \*

The different Courts for the Administration of Justice, in England, are,

I. The Court of Common Pleas. It formerly made a part of the Aula Regis; but as this latater Court was bound by its inftitution always to follow the person of the King, and private individuals experienced great difficulties in obtaining relief from a Court that was ambulatory, and always in motion, it was made one of the articles of the Great Charter, that the Court of Common Pleas should thenceforwards be held in a fixed place †; and since that time it has been seated at Westminster. It is composed of a Lord Chief Justice, with three other Judges; and appeals from its Judgments, usually called Writs of

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<sup>\*</sup> Unless they be private Acts.

<sup>+</sup> Communia Placita non sequantur Curiam nostram, sed teneantur in aliquo loco certo. Magna Charta, cap. 11.

Error, are brought before the Court of King's Bench.

II. The Court of Exchequer. It was originally established to determine those causes in which the King, or his servants, or accomptants, were concerned, and has gradually become open to all persons. The confining the power of this Court to the above class of persons, is therefore now a mere siction; only a man must, for form's sake, set forth in his declaration that he is debtor to the King, whether he be so, or no. The Court of Exchequer is composed of the Chief Baron of the Exchequer, and three other Judges.

III. The Court of King's Bench forms that part of the Aula Regis which continued to fubfift after the dismembering of the Common Pleas. This Court enjoys the most extensive authority of all other Courts: it has the superintendence over all Corporations, and keeps the various jurifdictions in the Kingdom within their respective bounds. It takes cognizance, acording to the end of its original inftitution, of all criminal causes, and even of many causes merely civil. It is composed of the Lord Chief Justice of the Court of King's Bench, and three other Judges. Writs of errour against the judgments passed in that Court in civil matters, are brought before the Court of the Exchequer Chamber; or, in most cases, before the House of Peers.

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IV. The Court of the Exchequer Chambers When this Court is formed by the four Barons; or Judges of the Exchequer, together with the Chancellor and Treasurer of the same, it sits as a Court of Equity; a kind of institution on which some observations will be introduced in a following Chapter. When this Court is formed by the twelve Judges, to whom sometimes the Lord Ceancellor is joined, its office is to deliberate, when properly referred and applied to, and give an opinion on important and difficult causes, before judgments are passed upon them, in those Courts where the causes are depending.

# CHAP. X.

On the Law, in regard to Civil Matters, that is observed in England.

CONCERNING the manner in which Justice is administered, in civil matters, in England, and the kind of law that obtains in that respect, the following observations may be made.

In the first place, it is to be observed, that the beginning of a civil process in England, and the first step usually taken in bringing an action, is the seizing by public authority the person against whom

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whom that action is brought. This is done with a view to fecure fuch person's appearance before a Judge, or at least make him give sureties for that purpose. In most of the Countries of Europe, where the forms introduced in the Roman Civil Law, in the reigns of the latter Emperors, have been imitated; a different method has been adopted to procure a man's appearance before a Court of Justice. The usual practice is to have the person sued, summoned to appear before the Court, by a public officer belonging to it, a week before-hand: if no regard is paid to fuch fummons twice repeated, the Plaintiff, or his Attorney, is admitted to make before the Court a formal reading of his demand, which is then granted him, and he may proceed to execution \*.

In this mode of proceeding, it is taken for granted, that a person who declines to appear before a Judge, to answer the demand of another, after being properly summoned, acknowledges the justice of such demand; and this supposition is very just and rational. However, the above mentioned practice of securing before-hand the body

<sup>•</sup> A person against whom a judgment of this kind has been passed (which they call in France un jugement par défaut) may easily obtain relief: but as he now in his turn becomes in a manner the Plaintiff, his deserting the cause, in this second stage of it, would leave him without remedy.

of a person sued, though not so mild in its execution as that just now described, nor even more effectual, appears more obvious and is more readily adopted, in those times when Courts of Law begin to be formed in a Nation, and rules of distributive justice to be established; and it is, very likely, followed in England as a continuation of the methods that were adopted when the English laws were as yet in their infancy.

In the times we mention, when laws begin to be formed in a Country, the administration of justice between individuals is commonly lodged in the fame hands which are intrufted with the public and military authority in the State. Judges invested with a power of this kind, like to carry on their operations with a high hand: they confider the refusal of a Man to appear before them, not as being barely an expedient to avoid doing that which is just, but as a contempt of their authority: they of course look upon themselves as being bound to vindicate it; and a writ of Capias is speedily issued to apprehend the refractory Defendant. A preliminary Writ, or order, of this kind, becomes in time to be used of course, and as the first regular step of a law-fuit; and thus, it is likely enough, has it happened that in the English Courts of law, if I am rightly informed, a Writ of Capias is either issued before

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the original Writ itself (which contains the summons of the plaintiff, and a formal delineation of his case), or is joined to such Writ, by means of an ac etiam capias, and is served along with it. It may be remembered that, in England, the Aulis Regis at the head of which the King himself presided, was originally the common. Court of Justice for the whole Kingdom, in civil as well as criminal matters, and continued so till the court of Common Pleas was in time separated from it.

In Rome, where the distribution of civil Justice was at first lodged in the hands of the Kings, and afterwards of the Consuls, the method of seizing the person of a Man against whom a demand of any kind was preferred, previously to any judgment being passed against him, was likewise adopted, and continued to be followed after the institution of the Prætor's Court, to whom the civil branch of the power of the Consuls was asterwards delegated; and it lasted till very late times; that is, till the times when those capital alterations were made in the Roman civil Law, during the reigns of the latter Emperors, which gave it the form it now has in those Codes or collections of which we are in possession.

A very fingular degree of violence even took place in Rome, in the method used to secure the persons of those aganist whom a legal demand was

preferred. In England, the way to feize upon the person of a Man under such circumstances, is by means of a public Officer, fupplied with a Writ or order for that purpose, supposed to be directed to him (or to the Sheriff his employer) from the King himself. But in Rome, every one became a kind of public officer in his own cause, to affert the Prætor's prerogative; and, without any oftenfible legal licence or badge of public authority, had a right to feize by force the person of his opponent, wherever he met him. The practice was, that the Plaintiff (Actor) first summoned the perfon fued (Reum) with a loud voice, to follow him before the Court of the Prætor . When the Defendant refused to obey such summons, the Plaintiff, by means of the words licet antestari, requested the by-standers to be witnesses of the fact, as a remembrance of which he touched the ears of each of them; and then proceeded to feize the person of his opponent, by throwing his arms round his neck (obtorto collo), thus endeavouring to drag him before the Prætor. When the person sued was, through age or fickness, disabled from following the Plaintiff, the latter was directed by the law of the Twelve Tables to supply him with a horse (jumentum dato).

\* Ad Tribunal Sequere, in Ius ambla.

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The above method of proceeding was however in after-times mitigated, though very late and flowly. In the first place, it became unlawful to feize a man in his own house, as it was the abode of his domestic Gods. Women of good family (Matronæ) were in time protected from the severity of the above custom, and they could no longer be dragged by force before the the Tribunal of the Prætor. The method of placing a fick or aged person by force upon a horse, seems to have been abolished during the latter times of the Republic. Emancipated Sons, and freed Slaves, were afterwards reftrained from fummoning their Parents, or late Master's, without having expressly obtained the Prætor's leave, under the penalty of fifty pieces of gold. However, so late as the time of Pliny, the old mode of furnmoning, or carrying by force, before a Judge, continued in general to fubfift; though, in the time of Ulpian, the necessity to expressly obtaining the Prætor's leave was extended to all cases and persons; and in Constantine's reign, the method began to be established of having legal summonfes ferved only by means of a public Officer appointed for that purpose. After that time, other changes in the former law were introduced. from which the mode of proceeding now used on the Continent of Europe, has been borrowed.

In England likewise, some changes we may observe, have been wrought in the law and practice concerning the arrefts of fued persons, though as flowly and late as those effected in the Roman Republic or Empire, if not more fo; which evinces the great impediments of various kinds that obstruct the improvement of laws in every Nation. So late as the reign of king George the First, an Act was passed to prohibit the practice of previous personal Arrest, in cases of demands under two pounds fterling; and fince that time, those Courts, justly called of Conscience, have been established, in which such demands are to be summarily decided, and fimple fummonfes, without arrest, can only be used. And lately, another Bill has been passed on the motion of Lord Beauchamp, whose name deferves to be recorded, by which the like prohibition of arrest is extended to all cases of debt under ten pounds sterling; a Bill the paffing of which was of twenty, or even a hundred times, more real importance than the rife or fall of a favourite or a Minister, though it has perhaps been honoured with a lefs degree of attention by the Public.

Another peculiarity of the English Civil Law, is the great refinements, formalities, and strictness that prevail in it. Concerning such refinements, which are rather impersections, the same

observation may be made that has been introduced above in regard to the mode and frequency of civil arrest in England; which is, that they are continuations of methods adopted when the English Law began to be formed, and are the confequences of the fituation in which the English placed themselves when they rejected the ready made Code of the Roman civil Law, compiled by order of Justinian, which most Nations of Europe have admitted, and rather chose to become their own Law-makers, and raise from the ground the structure of their own national Civil Code; which Code, it may be observed, is as yet in the first stage of its formation, as the Roman Law itself was during the times of the Republic, and in the reigns of the first Emperors.

The time at which the power of administering justice to individuals, becomes separated from the military power (an event which happens fooner or later in different Countries) is the real æra of the origin of a regular system of laws in a Nation. Judges being now deprived of the power of the fword, or, which amounts to the fame, being obliged to borrow that power from other persons, endeavour to find their resources within their own Courts, and, if possible, to obtain submission to their decrees from the great regularity of their I 3 pro-

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proceedings, and the reputation of the impartiality of their decisions.

At the fame time also, Lawyers begin to croud in numbers to Courts which it is no longer dangerous to approach, and add their refinements to the rules already fet down either by the Legislature or the Judges. As the employing of them is, espepecially in the beginning, matter of choice, and they fear, that, if bear common sense were thought fufficient to conduct a law-fuit, every body might imagine he knows as much as they do, they contrive difficulties to make their affiftance needful. As the true science of the Law, which is no other than the knowledge of a long feries of former rules and precedents, cannot as yet exist, they endeayour to create an artificial one to recommend themselves by. Formal distinctions and definitions are invented to express the different kinds of claims Men may fet up against one another; in which almost the same nicety is displayed as that used by Philosophers in classing the different subjects, or kingdoms, of natural History. Settled forms of words, under the name of Writs, or fuch like, are devised to set those claims forth; and, like introductory passes, serve to usher Claimants into the Temple of Justice, for fear their Clients should defert them after their first introduction, like a fick man who refts contented with a fingle visit

visit of the Physician, Lawyers contrive other ceremonies and technical forms for the farther conduct of the process and the pleadings; and in order still more safely to bind their Clients to their dominion, they at length obtain to make every error relating to their professional regulations, whether it be a missioner, a mispleading, or such like transgression, to be of as fatal a consequence as a failure against the laws of strict Justice. Upon the foundation of the above mentioned definitions and metaphysical distinctions of cases and actions, a number of strict rules of law are moreover raised, with which none can be acquainted but such as are complete masters of those distinctions and definitions.

To a person who in a posterior age observes for the first time such refinements in the distribution of Justice, they appear very strange, and even ridiculous. Yet, it must be confessed, that during the times of the first institution of Magistracies and Courts of a civil nature, ceremonies and formalities of different kinds, are very useful to procure to such Courts both the considence of those persons who are brought before them, and the respect of the Public at large; and they thereby become actual substitutes for military sorce, which, till then, had been the chief support of Judges. Those same forms and professional re-

gulations are moreover useful to give uniformity to the proceedings of the Lawyers and of the Courts of Law, and to infure constancy and steadiness to the rules they set down among themfelves. And if the whole system of the refinements we mention continues to fublist in very remote ages, it is in a great measure owing (not to mention other causes) to their having so coalesced with the effential parts of the Law as to make danger, or at least great difficulties, to be apprehended from a separation; and they may, in that respect, be compared with a scaffolding used in the raifing of a house, which, though only intended to fet the materials and support the builders, happens to be fuffered for a long time afterwards to fland, because it is thought the removing of it might endanger the building.

Very fingular law formalities and refined practices of the kind here alluded to, had been contrived by the first Jurisconsults in Rome, with a view to amplify the rules set down in the Laws of the Twelve Tables; which being but sew, and engraved on brass, every body could know as well as they: it even was a general custom to give those laws to children to learn, as we are informed by Cicero.

Very accurate definitions, as well as distinct branches of cases and actions, were contrived by the first Roman Jurisconsults; and when a Man had once made his election of that peculiar kind of action he chose to pursue his claim by, it became out of his power to alter it. Settled forms of words, called Actiones legis, were moreover contrived, which Men must absolutely use to set forth their demands. The party himself was to recite the appointed words before the Prætor; and should he unfortunately happen to miss or add a fingle word, fo as to feem to alter his real case or demand, he loft his fuit thereby. To this an allufion is made by Cicero, when he fays, " We " have a civil law fo constituted, that a Man be-"comes non-fuited, who has not proceeded " in the manner he should have done "." An observation of the like nature is also to be found in Quintilian, whose expressions on the subject are as follow: " There is besides another danger; " for if but one word has been mistaken, we are " to be confidered as having failed in every point " of our fuit +." Similar folemnities and appropriated forms of words were moreover necessary to introduce the reciprocal answers and replies of

<sup>\*</sup> Ita Ius civile babemus constitutum, ut causa cadat is qui non quomadmodum oportet egerit. De Invent II. 19.

<sup>+</sup> Est etiam periculosum, quum si uno verbo sit erratum, tota causa cecedisse videamur. Inst. Orat. III. 8. VII. 3.

the Parties, to require and accept fureties, to produce witnesses, &c.

Of the above Actiones legis, the Roman Jurisconfults and Pontiffs had carefully kept the exclufive knowledge to themselves, as well as of those Days on which religion did not allow Courts of law to fit . One Cn. Flavius, secretary to Appius Claudius, having happened to divulge the fecret of those momentous forms (an act for which he was afterwards preferred by the People), Jurisconfults contrived fresh ones, which they began to keep written with secret cyphers; but a Member of their own Body again betrayed them, and the new Collection which he published, was called Ius Ælianum, from his name, Sex. Ælius, in the same manner as the former collection had been called Ius Flavianum. However, it does not feem that the influence of Lawyers became much abridged by those two Collections: besides written information of that fort, practice is also necessary: and the public Collections we mention, like the many books that have been published on the English law, could hardly enable a Man to become a Lawyer, at least fufficiently so as to conduct a law-suit +.

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<sup>.</sup> Dies Fasti & Nefasti.

The Roman Jurisconsults had extended their skill to objects

Modern Civilians have been at uncommon pains to find out and produce the ancient law formulæ we mention; in which they really have had furprifing fuccess. Old Comic Writers, such as Plautus and Terence, have supplied them with several; the settled words, for instance, used to claim the property of a Slave, frequently occur in their Works.

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jects of voluntary jurisdiction as well as to those of contentious jurisdiction, and had devised peculiar formalities, forms of words, distinctions, and definitions, in regard to the contracting of obligations, between man and man, in regard to stipulations, donations, spousals, and especially last wills, in regard to all which they had displayed surprising nicety, refinement, accuracy, and strictness. The English Lawyers have not bestowed so much pains on the objects of voluntary jurisdiction, nor any thing like it.

\* The words addressed to the Plaintiss by the person sued, when the latter made his appearance on the day for which he had been compelled to give sureties, were as follow, and are alluded to by Plaut. Curcul. I. 3. v. 5. "Where art thou "who hast obliged me to give sureties? Where art thou "who summoness me? Here I stand before thee, do thyself "stand before me." To which the Plaintiss made answer, "Here I am." The defendant replied, "What dost thou say?" When the plaintiss answered, I say ... (Aio) and then followed the form of words by which he chose to express his action. Ubi tu es, qui me vadatus es? Ubi tu es qui me citassi? Ecce ego me tibi sisso; tu contra & te mibi sisse, &c.

If the action, for instance, was brought on account of goods stolen, the settled penalty or damages for which was the restitution of twice the value, the words to be used were,

Extremely like the above Actiones legis are the Writs used in the English Courts of law. Those Writs are framed for, and adapted to, every branch or denomination of actions, such as detinue, trespass, action upon the case, accompt, and

AIO decem aureos mibi furto tue abesse, teque eo nomine viginti aureos mibi dare oportere. For work done, such as cleaning of cloaths, &c. A10 te mibi tritici modium de quo inter nos, convenit ab polita vestimenta tua, dare oportere. For recovering the value of a Slave killed by another Citizen: A10 te bominem meum occidisse, teque mibi quantum ille boc anno plurimi suit dare oportere. For damages done by a vicious animal, A10 bovem Mævii servum meum, Stichum, cornu petiisse & occidisse, eoque nomine Mævium, aut servi æstimationem prassare, aut bovem mibi noxæ dare, oportere; or A10 ursum Mævii mibi vulnus intulisse, & Mævium quantum æquius melius mibi dare oportere, &c. &c.

It may be observed, that the particular kind of remedy which was provided by the law for the case before the Court, was expresly pointed out in the formula, used by a Plaintiss; and in regard to this no mistake was to be made. Thus, in the last quoted formula, the words quantum aquius melius, shew that the Prætor was to appoint inferior Judges, both to ascertain the damage done, and determine finally upon the case, according to the direction he previously gave them; these words being exclusively appropriated to the kind of Actions called Arbitraria, from the above-mentioned Judges or Arbitrators. In actions brought to require the execution of conventions that had no name, the convention itself was expressed in the formula; such is that which is recited above, relating to work done by the Plaintiss, &c. &c.

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to them as did in regard to the Roman law formulæ above mentioned: there is the same danger in misapplying them, or in failing in any part of them, and to use the words of an English Law-writer on the subject, "Writs "must be rightly directed, or they will be "nought.... In all writs, care must be had that "they be laid and formed according to their case, "and so pursued in the process thereof "."

The fame formality likewife prevails in the English pleadings and conduct of the process, as obtained in the old Roman law proceedings; and in the same manner as Roman Jurisconsults had their Actionis postulationes & editiones, their inficiationes, exceptiones, sponsiones, replicationes, duplicationes, &c. fo the English lawyers have their counts, bars, replications, rejoinders, sur-rejoinders, rebutters, sur-rebutters, &c. A scrupulous accuracy in observing certain rules, is moreover necessary in the management of those pleadings: the following are the words of an English Law-writer on the fubject: "Though the art and dexterity " of pleading, was in its nature and defign only " to render the fact plain and intelligible, and to " bring the matter to judgment with convenient

" certainty, it began to degenerate from its pri-

<sup>&</sup>quot; mitive fimplicity. Pleaders, yea and Judges,

<sup>\*</sup> Jacob's Law Dictionary. See Writ.

" having become too curious in that respect,

" pleadings at length ended in a piece of nicety

" and curiofity, by which the miscarriage of

" many a cause, upon small trivial objections,

" has been occasioned \*."

There is, however, a difference between the Roman Actiones legis, and the English Writs; which is, that the former might be framed when new ones were necessary, by the Prætor or Judge of the Court, or, in some cases, by the body of the Jurisconfults themselves, - Whereas Writs, when wanted for fuch new cases as may offer, can only be devifed by a diffinct Judge or Court, exclusively invested with such power, viz. the High Court of Chancery. The iffuing of Writs already existing, for the different cases to which they belong, is also expresly reserved to this Court: and so important has its office on those two points been deemed by Lawyers, that it has been called, by way of eminence, the Manufactory of Justice, (Officina Justitiæ). Original Writs besides, when once framed, are not at any time to be altered, except by Parliamentary authority †.

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<sup>·</sup> Cunningham's Law Dictionary. See Pleadings.

<sup>†</sup> Writs, legally issued, are also necessary for executing the different incidental proceedings that may take place in the course

Of so much weight in the English law, are the original delineations of cases we mention, that no cause is suffered to be proceeded upon, unless they first appear as legal introductors to it. However important or interesting the case, the Judge, till he sees the Writ he is used to, or at least a Writ issued from the right Manusactory, is both deaf and dumb. He is without eyes to see, or ears to hear. And, when a case of a new kind offers, for which there is as yet no Writ in being, should the Lord Chancellor and Masters in Chancery disagree in creating one, or prove unequal to the arduous task, the Great National Council, that is Parliament themselves, are in such emergency expressly applied to: by means of their

course of a law-suit, such as producing witnesses, &c. The names given to the different kinds of writs, are usually derived from the first Latin words by which they began when they were written in Latin, or at least from some remarkable word in them; which gives rise to expressions sufficiently uncouch and unintelligible. Thus, a Pone, is a writ issued to oblige a person in certain cases to give sureties (Pone per wadium, and salves plegios.) A writ of Subpæna is to oblige witnesses, and sometimes other classes of persons, to appear before a Court. An action of Qui tam, is that which is brought to sue for a proportional share of a sine established by some penal statute, by the person who laid an information: the words in the writ being, Qui tam pro Domino rege, quam pro seips in bac parte sequitur, &c. &c.

collected wisdom, the right mystical words are brought together: the Judge is restored to the free use of his organs of hearing and of speech; and, by the creation of a new Writ, a new province is added to the empire of the Courts of Law.

In fine, those precious Writs, those valuable Briefs (Brevia) as they are also called by way of eminence, which are the elixir and quintessence of the Law, have been committed to the special care of Officers appointed for that purpose, whose offices derive their names from those peculiar instruments they respectively use for the preservation of the deposit with which they are intrusted; the one being called the office of the Hamper, and the other, of the Small bag.

To fay the truth, however, the creating of a new Writ, upon any new given case, is matter of more difficulty than the generality of Readers are aware of. The very importance which is thought to be in those professional forms of words, renders them really important. As every thing without them is illegal in a Court of Common Law, so

<sup>\*</sup> Hanaperium & Parva baga the Hanaper Office, and the Petty-bag Office: the above two Latin words, it is not improper to observe, do not occur in Tully's works. To the care of the Petty-bag Office those writs are trusted in which the King's business is concerned; and to the Hanaper Office, those which relate to the Subject,

with them every thing becomes legal, that is to fay, they empower the Court legally to determine upon every kind of fuit to which they are made to ferve as introductors. The creating of a new Writ, therefore, amounts in its consequences to the framing of a new law, and a law of a general nature too: now, the creating of fuch a law, on the first appearance of a new case, which law is afterwards to be applied to all fuch cases as may be fimilar to the first, is really matter of difficulty; especially, when men are as yet in the dark as to the best kind of provision to be made for the case in question, or even when it is not perhaps yet known whether it be proper to make any provision at all. The framing of a new Writ under fuch circumstances, is a measure on which Lawyers or Judges will not very willingly either venture of themselves, or apply to the Legislature for that purpole.

Owing to the above mentioned real difficulty in creating new Writs on the one hand, and to the absolute necessity of such Writs in the Courts of Common Law on the other, many new species of claims and cases (the arising of which is from time to time the unavoidable confequences of the progress of trade and civilization) are left unprovided for, and remain like fo many vacant spaces in the Law, or rather,

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like fo many inacceffible fpots, which the laws in being cannot reach: now this is a great imperfection in the distribution of Justice, which should be open to every individual, and provide remedies for every kind of claim which Men may set up against one another.

To remedy the above inconvenience, or rather in some degree to palliate it, law sictions have been resorted to, in the English law, by which Writs, being warped from their actual meaning, are made to extend to cases to which they in no shape belong.

Law fictions of the kind we mention were not unknown to the old Roman Jurisconsults; and as an instance of their ingenuity in that respect, may be mentioned that kind of action, in which a Daughter was called a Son. Several instances might also be quoted of the fictitious use of Writs in the English Courts of Common Law. A very remarkable expedient of that fort occurs in the method generally used to sue for the payment of certain kinds of debt, before the Court of Common Pleas, such, if I am not mistaken, as a

<sup>\*</sup> From the above instance it might be concluded that the Roman Jurisconsults were possessed of still greater power than the English Parliament; for it is a fundamental principle with the English Lawyers, that Parliament can do every thing, except making a Woman a Man, or a Man a Woman.

falary for work done, indemnity for fulfilling orders received, &c. The Writ issued in those cases, is grounded on the supposition, that the perfon fued has trespassed on the ground of the Plaintiff, and broken by force of arms through his fences and inclosures; and under this predicament the Defendant is brought before the Court: this Writ, which has been that which Lawyers have found of most convenient use, to introduce before a Court of Common Law the kind of claim we mention, is called in technical language a Clausum fregit.—In order to bring a person before the Court of King's Bench, to answer demands of much the same nature which those above, a Writ, called a Latitat, is iffued, in which it is taken for granted that the Defendant infidiously conceals himself, and is lurking in some County, different from that in which the Court is fitting; the expressions used in the Writ being, that "he runs " up and down and fecretes himfelf;" though no fuch fact is feriously meant to be advanced either by the Attorney or the Party.

The fame principle of strict adherence to certain forms long since established, has also caused Lawyers to introduce into their proceedings, sictitious names of persons who are supposed to discharge the office of sureties; and in certain cases, it seems, the name of a sictitious person is intro-

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duced in a Writ along with that of the principal Defendant, as being joined in a common cause with him. Another instance of the same high regard of Lawyers, and Judges too, for certain old forms, which makes them more unwilling to depart from such forms than from the truth itself of sacts, occurs in the above-mentioned expedient used to bring ordinary causes before the Court of Exchequer, in order to be tried there at Common Law; which is, by making a declaration that the Plaintiff is a King's debtor, though neither the Court, nor the Plaintiff's Attorney, lay any serious stress on the affertion.

Another instance of the strict adherence of the English Lawyers to their old established forms in preference even to the truth of facts, occurs in the manner of executing the very Act mentioned in this Chapter, passed in the reign of George I. for preventing personal Arrest for debts under forty shillings. If the defendant, after being personally served with a copy of the process, does not appear on the appointed days, the method is to suppose that he has actually made his appearance, and the cause is proceeded upon according to this supposition: sectious names of bails are also resorted to.

The inhabitants of Bengal, and other East India provinces, have been prodigiously surprised, it is said, at the refinements, sictions, and intricacy of the English law, in regard to civil matters, which was introduced among them a few years ago; and it is certainly not to be doubted that they may have been astonished.

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# energianisti salam CHAP. XI.

The Subject continued. The Courts of Equity.

HOWEVER, there are limits to the law fictions and fubtilities we mention; and the remedies of the Law cannot by their means be extended to all possible cases that arise, unless too many absurdities are suffered to be accumulated; nay, there have been instances in which the improper application of Writs, in the Courts of Law, has been checked by authority. In order therefore to remedy the inconveniences we mention, that is, in order to extend the administration of distributive justice to all possible cases, by freeing it from the professional difficulties that have gradually grown up in its way, a new Kind of Courts has been instituted in England, called Courts of Equity.

The generality of people, misled by this word Equity, have conceived false notions of the office of the Courts we mention; and it seems to be generally thought that the Judges who sit in them, are only to follow the rules of natural Equity; by which People appear to understand, that in a Court of Equity, the Judge may follow the dictates of

his own private feelings, and ground his decisions as he thinks proper, on the peculiar circumstances and fituation of those persons who make their appearance before him. Nay, Doctor Johnson, in his abridged Dictionary, gives the following definition of the power of the Court of Chancery, confidered as a Court of Equity: "The Chancellor " hath power to moderate and temper the writ-" ten law, and subjecteth himself only to the law " of nature and conscience;" for which definition Dean Swift, and Cowell, who was a Lawyer, are quoted as authorities. Other instances might be produced of Lawyers who have been inaccurate in their definitions of the true offices of the Judges of Equity. And the above named Doctor himfelf is on no subject a despicable authority.

Certainly the power of the Judges of Equity cannot be to alter, by their own private power, the Written Law, that is, Act of Parliament, and thus to controul the Legislature. Their office only consists, as will be proved in the sequel, in providing remedies for those cases for which the public good requires that remedies should be provided, and in regard to which the Courts of Common Law, shackled by their original forms and institutions, cannot procure any:—or, in other words—the Courts of Equity have a power to administer Justice to individuals, unrestrained, not

by the Law, but by the professional law difficulties which Lawyers have from time to time contrived in the Courts of Common Law, and to which the Judges of those Courts have given their fanction.

An office of the kind here mentioned, was foon found necessary in Rome, for reasons of the same nature with those above delineated. For, it is remarkable enough, that the Body of English Lawyers, by refusing admittance to the Code of Roman Laws, as it existed in the latter times of the Empire, have only subjected themselves to the same difficulties under which the old Roman Jurisconfults laboured, during the time they were raifing the structure of those same Laws. And it may also be observed, that the English Lawyers or Judges have falled upon much the fame expedients as those which the Roman Jurisconsults and Prætors had adopted.

This office of a Judge of Equity, was in time affumed by the Prætor in Rome, in addition to the judicial power he before possessed . the beginning of the year for which be had been elected, the Prætor made a declaration of those

The Prætor thus possessed two distinct branches of judicial authority, in the same manner as the Court of Exchequer does in England, which occasionally sits as a Court of Common Law, and a Court of Equity.

remedies for new difficult cases, which he had determined to afford during the time of his Magistracy; in the choice of which he was no doubt directed, either by his own observations, while out of office, on the propriety of such remedies, or by the suggestions of experienced Lawyers on the subject. This Declaration (Ediaum) the Prætor produced in albo, as the expression was. Modern Civilians have made many conjectures on the real meaning of the above words; one of their suppositions, which is as likely to be true as any other, is, that the Prætor's Ediaum, or heads of new law remedies, were written on a whitened wall, by the side of his Tribunal.

Among the provisions made by the Roman Prætors in their capacity of Judges of Equity, may be mentioned those which they introduced in favour of emancipated Sons and of relations by the Women's side (Cognati), in regard to the right of inheriting. Emancipated Sons were supposed, by the Laws of the Twelve Tables, to have ceased to be the children of their Father, and, as a consequence, a legal claim was denied them on the paternal inheritance: Relations by the Woman's side were taken no notice of, in that article of the same laws which treated of the right of succession, mention being only made of relations by the Men's side (Agnati.) The for-

ther, the Prætor admitted, by the Edict Unde Liberi, to share their Father's (or Grandfather's) inheritance along with their brothers; and the latter he put in possession of the patrimony of a kinfman deceased, by means of the Edict Unde Cognati, when there were no relations by the Men's side. These two kinds of inheritance were not however called bæreditas, but only bonorum possession; these words being very accurately distinguished, though the effect was in the issue exactly the same \*.

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· As the power of Fathers, at Rome, was unbounded, and lasted as long as their life, the emancipating of Sons was a case that occurred frequently enough, either for the fecurity or fatisfaction of those who engaged in any undertaking with them. The power of Fathers had been carried fo far by the laws of Romulus, confirmed afterwards by those of the Twelve Tables, that they might fell their Sons for flaves as often as three times, if, after a first or second fale, they happened to acquire their liberty: it was only after being fold for the third time, and then becoming again free, that Sons could be entirely released from the paternal authority. On this law-doctrine was founded the peculiar formality and method of emancipating Sons. A pair of scales, and some copper coin, were first brought; without the presence of these ingredients, the whole business would have been void; and the Father then made a formal fale of his fon to a person appointed to buy him, who was immediately to free or manumit him: these sales and manumissions were repeated three times. Five witnesses were to be present, besides a Man to hold the scales (Libripens), and another (Antestatus)

In the same manner, the Laws of the Twelve Tables had provided relief only for cases of thest; and no mention was made in them of cases of goods taken away by force (a deed which was not looked upon in so odious a light at Rome as thest, which was considered as the peculiar guilt of slaves.) In process of time the Prætor promised relief to such persons as might have their goods taken from then by open force, and gave them an action for the recovery of sour times the value, against those who had committed the sact with an evil intention. Sicui dolo malo bona rapta esse dicentur, ei in quadruplum Judicium dabo,

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Again, neither the Law of the Twelve Tables, nor the Laws made afterwards in the Assemblies of the People, had provided remedies except for very sew cases of fraud. Here the Prætor likewise interfered in his capacity of Judge of Equity, though so very late as the times of Cicero; and promised relief to destrauded persons, in those cases in which the Laws in being afforded no action. Que dolo malo fasta esse dicentur, si de bis rebus alia astio non erit, & justa causa esse videbitur, Judicium pabo. By Edicts of the same nature, Prætors

occasionally to remind the witnesses to be attentive to the business before them.

<sup>#</sup> At the same time that the Prætor proffered a new

in process of time gave relief in certain cases to married Women, and likewise to Minors (Minoribus xxv annis succurrit Prætor, &c. †.

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Edict, he also made public those peculiar formulæ by which the execution of the same was afterwards to be required from him. The name of that Prætor who sirst produced the Edict above-mentioned, was Aquilius, as we are informed by Cicero, in that elegant story well known to Scholars, in which he relates the kind of fraud that was put upon Canius, a Roman Knight, when he purchased a pleasure-house and gardens, near Syracuse in Sicily. This account Cicero concludes with observing, that Canius was lest without remedy, as Aquilius, his Colleague and friend, had not yet published his formulæ concerning fraud." Quid enim faceret? nondum enim Aquilius, Collega & familiaris meus, protulerat de dolo malo formulas. Oss. III. 14.

the series of Edicts published at different times by Prætors, was called Ius Prætorium, and also Ius Honorarium (net firiatily binding.) The laws of the Twelve Tables, together with all such other Laws as had at any time been passed in the Assembly of the People, were called, by way of eminence, Ius Civile. The distinction was exactly of the same nature as that which takes place in England, between the Common and Statute Laws, and the law or practice of the Courts of Equity. The two branches of the Prætor's judicial office were very accurately distinguished; and there was besides, this capital difference between the remedies or actions which he gave in his capacity of Judge of Civil Law, and those in his capacity of Judge of Equity, that the former, being grounded on the Ius Civile, were perpetual; the latter must be pre-

ferred

The Courts of Equity established in England, have in like manner provided remedies for a very great number of cases, or species of demand, for which the Courts of Common Law, cramped by their forms and peculiar law tenents, can afford none. Thus, the Courts of Equity may, in certain cases, give actions for and against infants, notwithstanding their minority—and for and against married Women notwithstanding their coverture. Married Women may even in certain cases, sue their husbands before a Court of Equity. Executors may be made to pay interest for money that lies long in their hands. Courts of Equity may appoint Commissioners to hear the evidence of absent witnesses. When other proofs fail, they may impose an oath on either of the Parties; or, in the like case of a failure of proofs, they may compel a trader They may also to produce his books of trade. confirm a title to land, though one has loft his writings, &c. &c.

The power of the Courts of Equity in England, of which the Court of Chancery is the principal one, no doubt owes its origin to the power possessed by this latter, both of creating and issu-

ferred within the year, and were accordingly called Actiones annua or Actiones pratoria; in the same manner as the former were called Actiones civiles, or Actiones perpetua.

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ing Writs. When new complicated cases offered, for which a new kind of Writ was wanted, the Judges of Chancery, finding that itwas necessary that justice should be done, and at the same time being unwilling to make general and perpetual provisions on the cases before them by creating new Writs, commanded the appearance of both Parties, in order to procure as complete information as possible in regard to the circumstances attending the case; and then they gave a decree upon the same by way of experiment.

To beginnings and circumstances like these the English Courts of Equity, it is not to be doubted, owe their present existence. In our days, when fuch strict notions are entertained concerning the power of Magistrates and Judges, it can scarcely be supposed that those Courts, however useful. could gain admittance. Nor indeed, even in the times when they were instituted, were their proceedings free from opposition; and afterwards, so late as the reign of Queen Elizabeth, it was adjudged in the case of Colleston and Gardner, that the killing a Sequestrator from the Court of Chancery, in the discharge of his business, was no murder, which judgment could only be awarded on the ground that the Sequestrator's commission, and confequently the power of his Employers, were

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illegal •. However, the authority of the Courts of Equity has in process of time become settled; one of the constituent branches of the Legislature even receives at present appeals from the decrees passed in those Courts; and I have no doubt that several Acts of the whole Legislature might be produced, in which the office of the Courts of Equity is openly acknowledged.

The kind of process that has in time been established in the Court of Chancery, is as follows. After a petition is received by the Court, the person sued is served with a writ of Subpana, to command his appearance. If he does not appear, an attachment is issued against him; if a non inventus is returned, that is, if he is not to be found, a proclamation goes forth against him; then a commission of rebellion is issued for apprehending him, and bringing him to the Fleet prison. If the person sued stands farther in contempt, a Serjeant at arms is to be sent out to take him; and if he cannot be taken, a sequestration of his

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When Sir Edward Coke was Lord Chief Justice of the King's Bench, and Lord Ellesmere Lord Chancellor, during the reign of James I. a very serious quarrel also took place between the Courts of Law, and those of Equity, which is mentioned in the fourth Chapter of the third Book of Judge Blackstone's Commentaries: a Work in which more might have been said on the subject of the Courts of Equity.

and may be obtained till he appears. Such is the power which the Court of Chancery, as a Court of Equity, hath gradually acquired to compel appearance before it. In regard to the execution of the Decrees it gives, it feems that Court has not been quite fo fuccessful; at least, those Law-writers whose Works I have had an opportunity to see, hold it as a maxim, that the Court of Chancery cannot bind the estate, but only the person; and as a consequence, a person who refuses to submit to its decree, is only to be confined to the Fleet prison.

On this occasion I shall observe, that the authority of the Lord Chancellor, in England, in his capacity of a Judge of Equity, is much more narrowly limited than that which the Prætors in Rome had been able to assume. The Roman Prætors, we are to remark, united in themselves the double office of deciding cases according to the Civil

The Court of Chancery was very likely the first instituted of the two Courts of Equity: as it was the Highest Court in the Kingdom, it was best able to begin the establishment of an office, or power, which naturally gave rise at first to so many objections. The Court of Exchequer, we may suppose, only followed the example of the Court of Chancery: in order the better to secure the new power it assumed, it even found it necessary to bring out the whole strength it could muster: and both the Treasurer and the Chancellor of a Exchequer sit for (or are supposed to sit) in the Court of Exchequer, when it is formed as a Court of Equity.

Law (Ius civile), and to the Prætorian Law, or Law of Equity; nor did there exist any other Court belides their own, that might ferve as a check upon them: hence it happened that their proceedings in the career of Equity, were very arbitrary indeed. In the first place, they did not use to make it any very strict rule to adhere to the tenor of their own Edicts, during the whole year which their office lasted; and they assumed a power of altering them as they thought proper. To remedy fo capital a defect in the distribution of Justice, a law was passed so late as the year of Rome 687 (not long before Tully's time) which was called Lex Cornelia, from the name of C. Cornelius, a Tribune of the People, who propounded it under the Confulship of C. Piso, and Man. Glabrio. By this law it was enacted, that Prætors should in future constantly decree according to their own Edicts, without altering any thing in them during the whole year of their Prætorship. Some modern Civilians produce a certain Senatufconfult to the fame effect, which, they fay, had been passed a hundred years before; while others are of opinion that the same is not genuine: however, supposing it to be really so, the passing of the law we mention, shews that it had not been fo well attended to as it ought to have been. the No (or are hoppided on te) Though it is formed as a Court of Equaty

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Though the above mentioned arbitrary proceedings of Prætors were put a stop to, they still retained another privilege, equally hurtful; which was, that every new Prætor, on his coming into office, had it in his power to retain only what part he pleased of the Edicts of his predecessors, and to reject the remainder: from which it followed that the Prætorian Laws or Edicts, though provided for fo great a number of important cases, were really in force for only one year, the time of the duration of a Prætor's office . Nor was a regulation made to remedy this capital defect in the Roman Jurisprudence, before the time of the Emperor Hadrian; which is another remarkable proof of the very great flowness with which useful public regulations take place in every Nation. Under the reign of the Emperor we mention, the most useful Edicts of former Prætors were by his order collected, or rather compiled, into one general Edict, which was thenceforwards

<sup>\*</sup> Those Edicts of their predecessors in office, which the new Prætors thought proper to retain, were called Edicia Tralatitia; those which they themselves published (as also the alterations they made in former ones) were called Edicia Nova. From the above mentioned power exercised by every new Prætor in turn, their Edicts were sometimes distinguished by the appellation of Leges annua, annual laws. See Orat. in Ver. 1.42.

to be observed by all civil Judges in their decifion, and was accordingly called the perpetual
Edict (perpetuum Edictum.) This Edict, though
now lost, soon grew into great repute; all the
Jurisconsults of those days vied with each other
in writing commentaries upon it; and the Emperor himself thought it so glorious an act of his
reign, to have caused the same to be framed,
that he considered himself on that account as being another Numa.

But the Courts of Equity in England, notwithflanding the extensive jurisdiction they have been able in process of time to assume, never superseded the other Courts of law. These Courts still

\* Several other more extensive law compilations were framed after the perpetual Edict we mention: there having been a kind of emulation between the Roman Emperors, in regard to the improvement of the Law. At last, under the reign of Justinian, that celebrated Compilation was published, called the Code of Justinian, which under different titles, comprises the Roman Laws, the Edicts of the Prætors, together with the rescripts of the Emperors; and an equal sanction was given to the whole. This was an event of much the same nature as that which will take place in England, whenever a coalition shall be effected between the Courts of Common Law, and those of Equity, and both shall thenceforwards be bound alike to frame their judgments from the whole mass of decided cases and precedents then existing, at least of such as it will be possible to bring consistently together into one compilation.

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continue to exist in the same manner as formerly, and have proved a lafting check on the innovations, and in general the proceedings of the Courts of Equity. And here we may remark the fingular, and at the fame time effectual, means of balancing each other's influence, reciprocally poffeffed by the Courts of the two different species. By means of its exclusive privilege both of creating and iffuing writs, the Court of Chancery has been able to hinder the Courts of Common Law from arrogating to themselves the cognizance of those new cases which were not provided for by any law in being, and thus dangeroufly uniting in themselves the power of Judges of Equity with that of Judges of Common Law. On the other hand, the Courts of Common Law are alone invested with the power of punishing (or allowing damages for) those cases of violence by which the proceedings of the Courts of Equity might be opposed; and by that means they have been able to obstruct the enterprises of the latter, and prevent their effecting in themfelves the like dangerous union of the two offices of Judges of Common Law, and of Equity.

Owing to the fituation of the English Courts of Equity, with respect to the Courts of Common Law, those Courts have really been kept within limits that may be called exactly defined,

if the nature of their functions be confidered. In the first place, they can neither touch Acts of Parliament, nor the established practice of the other Courts, much less reverse the judgments already paffed in these latter, as the Roman Prætors fometimes used to do in regard to the decifions of their predecessors in office, and sometimes also in regard to their own. The Courts of Equity are even restrained from taking cognizance of any case for which the other Courts can possibly afford remedies. Nay, so strenuously have the Courts of Common Law defended the verge of their frontier, that they have prevented the Courts of Equity from using in their proceedings the mode of Trial by a Jury; fo that, when in a case already begun to be taken cognizance of by the Court of Chancery, the Parties happen to join iffue on any particular fact (the truth or falsehood of which a Jury is to determine), the Court of Chancery is obliged to deliver up the cause to the Court of King's Bench, there to be finally decided . In fine, the example of the regularity of the proceedings, practifed in the courts of Common Law, has been communicated to the Courts of Equity; and Rolls or Records are carefully kept of the pleadings, determina-

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<sup>•</sup> See Cunningham's and Jacob's Law Dictionaries, paf-

tions, and acts of those Courts, to serve as rules for future decisions.

So far therefore from having it in his power "to temper and to moderate," (that is, to alter) the Written Law or Statutes, a Judge of Equity, we find, cannot alter the Unwritten Law, that is to fay, the established practice of the other Courts, and the judgments grounded thereupon,—nor even can he meddle with those cases for which either the Written or Unwritten Law have already made general provisions, and of which there is a possibility for the ordinary Courts of Law to take cognizance.

From all the above observations it follows, that, of the Courts of Equity as established in England, the following definition may be given, which is, that they are a kind of inferior experimental Legislature, continually employed in finding out and providing law remedies for those new species of cases for which neither the Courts of Common Law, nor the Legislature, have as yet found it convenient or practicable to establish any. In doing which, they are to forbear to interfere with such cases as they find already in general

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<sup>•</sup> The Master of the Rolls is the Keeper of those records, as the title of this office expresses. His office in the Court of Chancery is of great importance, as he can hear and determine causes in the absence of the Lord Chancellor.

provided for. A Judge of Equity is also to adhere in his decisions, to the system of decrees formerly passed in his own Court, regular records of which are kept for that purpose.

From this latter circumstance it again follows, that a Judge of Equity, by the very exercise he makes of his power, is continually abridging the arbitrary part of it; as every new case he determines, every precedent he establishes, becomes a land-mark or boundary which both he and his fuccessors in office are afterwards expected to regard.

Here it may be added as a conclusion, that appeals from the Decrees passed in the Courts of Equity are carried to the House of Peers; which bare circumstance might suggest that a Judge of Equity is subjected to certain positive rules, befides those " of nature and conscience only:" an appeal being naturally grounded on a supposition that fome rules of that kind were neglected.

The above discussion on the English Law, has proved much longer than I intended at first; fo much as to have fwelled, I find, into two new additional Chapters. However, I confess I have been under the greater temptation to treat at some length the subject of the Courts of Equity, as I have found the error (which may be called a constitutional one) concerning the arbitrary office of

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those Courts, to be countenanced by the apparent authority of Lawyers, and of Men of abilities, at the fame time that I have not feen in any book any attempt made profesfedly to confute the same, nor indeed to point out the nature and true office of the Courts of Equity.

#### CHAP. XII.

# Of Criminal Justice.

WE are now to treat of an article, which, though it does not in England, and indeed should not in any State, make part of the powers which are properly Constitutional, that is, of the reciprocal rights by means of which the Powers that concur to form the Government constantly balance each other, yet effentially interests the security of individuals, and, in the iffue, the Constitution itself; I mean to speak of Criminal Justice. But, previous to an exposition of the laws of England on this head, it is necessary to defire the Reader's attention to certain confiderations.

When a Nation entrusts the power of the State to a certain number of persons, or to one, it is with a view to two points: the one, to repel more effectually foreign attacks; the other, to maintain domestic tranquillity.

To accomplish the former point, each individual surrenders a share of his property, and sometimes, to a certain degree, even of his liberty. But, though the power of those who are the Heads of the State may thereby be rendered very considerable, yet it cannot be said, that liberty is, after all, in any high degree endangered; because should ever the Executive Power turn against the Nation a strength which ought to be employed solely for its desence, this Nation, if it were really free, by which I mean, unrestrained by political prejudices, would be at no loss for providing the means of its security.

In regard to the latter object, that is, the maintenance of domestic tranquillity, every individual must, exclusive of new renunciations of his natural liberty, moreover surrender, which is a matter of far more dangerous consequence, a part of his personal security.

The Legislative power being, from the nature of human affairs, placed in the alternative, either of exposing individuals to dangers which it is at the same time able extremely to diminish, or of delivering up the State to the boundless calamities of violence and anarchy, finds itself compelled to reduce all its members within reach of the arm of the public Power, and, by withdrawing in such cases the benefit of the Social strength, to leave them

them exposed, bare, and defenceless, to the exertion of the comparatively immense power of the Executors of the laws.

Nor is this all; for, instead of that powerful re-action which the public authority ought in the former case to experience, here it must find none; and the law is obliged to proscribe even the attempt of resistance. It is therefore in regulating so dangerous a power, and in guarding lest it should deviate from the real end of its institution, that legislation ought to exhaust all its efforts.

But here it is of great importance to observe, that the more powers a Nation has reserved to itself, and the more it limits the authority of the Executors of the laws, the more industriously ought its precautions to be multiplied.

In a State where, from a series of events, the will of the Prince has at length attained to hold the place of law, he spreads an universal oppression, arbitrary, and unresisted; even complaint is dumb: and the individual, undistinguishable by him, finds a kind of safety in his own insignificance. With respect to the sew who surround him, as they are at the same time the instruments of his greatness, they have nothing to dread but momentary caprices; a danger against which, if there prevails a certain general mildness of manners, they are in a great measure secured.

But in a State where the Ministers of the laws meet with obstacles at every step, even their strongest passions are continually put in motion; and that portion of public authority, deposited with them to be the instrument of national tranquillity, easily becomes a most formidable weapon.

Let us begin wirh the most favourable suppofition, and imagine a Prince whose intentions are in every case thoroughly upright,—let us even suppose that he never lends an ear to the suggestions of those whose interest it is to deceive him: nevertheless, he will be subject to error: and this error, which, I will farther allow, solely proceeds from his attachment to the public welfare, yet may very possibly happen to prompt him to act as if his views were directly opposite.

When opportunities shall offer (and many such will occur) of procuring a public advantage by overleaping restraints, consident in the uprightness of his intentions, and being naturally not very earnest to discover the distant evil consequences of actions in which, from his very virtue, he seels a kind of complacency, he will not perceive, that, in aiming at a momentary advantage, he strikes at the laws themselves on which the safety of the Nation rests, and that those acts, so laudable when we only consider

the motive of them, make a breach at which tyranny will one day enter.

Yet farther, he will not even understand the complaints that will be made against him, To insist upon them will appear to him to the last degree injurious: pride, when perhaps he is least aware of it, will enter the lists; what he began with calmness, he will prosecute with warmth; and if the laws shall not have taken every possible precaution, he may think he is acting a very honest part, while he treats as enemies of the State, Men whose only crime will be that of being more sagacious than himself, or of being in a better situation for judging of the results of measures.

But it were mightily to exalt human nature, to think that this case of a Prince who never aims at augmenting his power, may, in any shape be expected frequently to occur. Experience, on the contrary, evinces that the happiest dispositions are not proofs against the allurements of power, which has no charms but as it leads on to new advances; authority endures not the very idea of restraint; nor does it cease to struggle till it has beaten down every boundary.

Openly to level every barrier, at once to assume the absolute Master, are, as we said before, fruitless tasks. But it is here to be remembered, that those

those powers of the People which are reserved as a check upon the Sovereign, can only be effectual so far as they are brought into action by private individuals. Sometimes a Citizen, by the force and perseverance of his complaints, opens the eyes of the Nation; at other times, some member of the Legislature proposes a law for the removal of some public abuse; these, therefore, will be the persons against whom the Prince will direct all his efforts.

And he will the more affuredly do fo, as, from the error fo usual among Men in power, he will think that the opposition he meets with, however general, wholly depends on the activity of but one or two leaders; and amidst the calculations he will make, both of the supposed smallness of the obstacle which offers to his view, and of the decisive consequence of the single blow he thinks he needs to strike, he will be urged on by the despair of ambition on the point of being basseled, and by the most violent of all hatreds, that which was preceded by contempt.

In that which I am still considering, of a really free Nation, the Sovereign must be very careful that military violence do not make the smallest

<sup>\*</sup> By the word Prince, I mean those who, under whatever appellation and in whatever Government it may be, are at the head of public affairs.

part of his plan: a breach of the focial compact like this, added to the horror of the expedient, would infallibly endanger his whole authority. But, on the other hand, as he was refolved to fucceed, he will in defect of other refources, try the utmost extent of the legal powers which the Constitution has intrusted with him; and if the laws have not in a manner provided for every possible case, he will avail himself of the imperfect precautions themselves that have been taken, as a cover to his tyrannical proceedings; he will purfue steadily his particular object, while his professions breathe nothing but the general welfare, and destroy the affertors of the laws, under the very shelter of the forms contrived for their security .

This is not all; independently of the immediate mischief he may do, if the Legislature do not interpose in time, the blows will reach the Constitution itself; and the consternation becoming general amongst the People, each individual will

<sup>\*</sup> If there were any person who charged me with calumniating human Nature, for it is her alone I am accusing here, I would desire him to cast his eyes on the History of a Lewis XI.—of a Richelieu, and, above all, on that of England before the Revolution: he would see the arts and activity of Government increase, in proportion as it gradually lost its means of oppression.

find himself enslaved in a State which yet may ftill exhibit all the common appearances of liberty.

Not only therefore, the fafety of the individual, but that of the Nation itself, requires the utmost precautions of the establishment of that necessary. but formidable, prerogative of dispensing punish-The first to be taken, even without which it is impossible to avoid the dangers above fuggested, is, that it never be left at the disposal, nor, if it be possible, exposed to the influence of the Man who is the depositary of the public power.

The next indispensable precaution is, that neither shall this power be vested in the legislative Body; and this precaution, so necessary alike under every mode of Government, becomes doubly fo, when only a small part of the Nation has a share in the legislative power.

If the judicial authority were lodged in the legislative part of the People, not only the great inconvenience must ensue of its thus becoming independent, but also that worst of evils, the suppression of the sole circumstance that can well identify this part of the Nation with the whole, which is, common subjection to the rules which they themselves prescribe. The legislative Body, which could not, without ruin to itself, establish,

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openly and by direct laws, distinctions in favour of its Members, would introduce them by its judgments: and the People, in electing Representatives, would give themselves Masters.

The judicial power ought therefore absolutely to reside in a subordinate and dependent body; dependent, not in its particular acts, with the regard to which it ought to be a sanctuary, but in its rules and in its forms, which the legislative authority must prescribe. How is this body to be composed? In this respect farther precautions must be taken.

In a State where the Prince is absolute Master, numerous Bodies of Judges are most convenient, inasmuch as they restrain, in a considerable degree, that respect of Persons which is one inevitable attendant on that mode of Government. Besides, those bodies, whatever their outward privileges may be, being at bottom in a state of great weakness, have no other means of acquiring the respect of the people than their integrity, and their constancy in observing certain rules and forms: nay, these circumstances united, in some degree overawe the Sovereign himself, 'and discourage the thoughts he might entertain of making them the tools of his caprice.

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<sup>\*</sup> The above observations are in a great measure meant to allude to the French Parlemens, and particularly that of Paris, which

But, in an effectually limited Monarchy, that is, where the Prince is understood to be, and in fact is, subject to the laws, numerous Bodies of Judicature would be repugnant to the spirit of the Constitution, which requires that all powers in the State should be as much confined as the end of their institution can allow; not to add, that in the vicissitudes incident to such a State, they might exert a very dangerous influence.

which forms such a considerable Body as to have been once summoned as a fourth Order to the General Estates of the kingdom. The weight of that body, increased by the circumstance of the Members holding their places for life, has in general been attended with the advantage just mentioned, of placing them above being over-awed by private individuals in the administration either of civil or criminal Justice; it has even rendered them so difficult to be managed by the Court, that the Ministers have been at times obliged to appoint particular Judges, or Commissaries, to try such Men as they resolved to ruin.

These, however, are only local advantages, and relative to the nature of the French Government, which is an uncontrouled Monarchy, with considerable remains of Aristocracy. But in a free State, such a powerful Body of Men, vested with the power of deciding on the life, honour, and property, of the Citizens, would, as will be presently shewn, be productive of very dangerous political consequences; and the more so, if such Judges had, as is the case all over the world, except here, the power of deciding upon the matter of law, and the matter of sact.

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Besides, that awe which is naturally inspired by fuch Bodies, and is fo useful when it is necessary to strengthen the feebleness of the laws, would not only be superfluous in a state where the whole power of the Nation is on their fide, but would moreover have the mischievous tendency to introduce another fort of fear than that which Men must be taught to entertain. Those mighty Tribunals, I am willing to suppose, would preferve, in all fituations of affairs, that integrity which distinguishes them in States of a different Constitution; they would never inquire after the influence, still less the political sentiments, of those whose fate they were called to decide; but these advantages nothing founded in the necessity of things, and the power of fuch Judges feeming to exempt them from being fo very virtuous, Men would be in danger of taking up the fatal opinion, that the simple exact observance of the laws is not the only task of prudence: the Citizen called spon to defend, in the sphere where fortune has placed him, his own rights, and those of the Nation itself, would dread the consequence of even a lawful conduct, and though encouraged by the law, might defert himfelf when he came to behold its Ministers.

In the affembly of those who sit as his Judges, the Citizen might possibly descry no enemies:

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but neither would he see any Man whom a similarity of circumstances might engage to take a concern in his fate: and their rank, especially when joined with their numbers, would appear to him, to lift them above that which over-awes injustice, where the law has been unable to secure any other check, I mean the reproaches of the Public.

And these his sears would be considerably heightened, if, by the admission of the Juririsprudence received among certain Nations, he beheld those Tribunals, already so formidable, wrap themselves up in mystery, and be made, as it were, inaccessible \*.

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• An allusion is made here to the secrecy with which the proceedings, in the administration of criminal Justice, are to be carried on, according to the rules of the civil law, which in that respect are adopted over all Europe. As soon as the prisoner is committed, he is debarred of the sight of every body, till he has gone through his several examinations. One or two Judges are appointed to examine him, with a Clerk to take his answers in writing: and he stands alone before them in some private room in the prison. The witnesses are to be examined a-part, and he is not admitted to see them till their evidence is closed: they are then confronted together before all the Judges, to the end that the witnesses may see if the prisoner is really the Man they meant in giving their respective evidences, and that the prisoner may object to such of them as he shall think proper. This done, the depositions of

He could not think, without difmay, of those vast prisons within which he is one day perhaps to be immured—of those proceedings, unknown to him, though which he is to pass—of that total seclusion from the society of other Men—nor of those long and secret examinations, in which, abandoned wholly to himself, he will have nothing but a passive desence to oppose to the artfully varried questions of Men, whose intentions

those witnesses who are adjuged upon trial to be exceptionable, are set aside: the depositions of the others are to be laid before the Judges, as well as the answers of the prisoner, who has been previously called upon to confirm or deny them in their presence; and a copy of the whole is delivered to him, that he may, with the affistance of a Counsel, which is now granted him, prepare for his justification. The Judges are, as has been said before, to decide both upon the matter of law and the matter of sact, as well as upon all incidents that may arise during the course of the proceedings, such as admitting witnesses to be heard in behalf of the prisoner, &c.

This mode of criminal Judicature may be useful as to the bare discovering of truth, a thing which I do not propose to discuss here; but, at the same time, a prisoner is so completely delivered up into the hands of the Judges, who even can detain him almost at pleasure by multiplying or delaying his examinations, that, whenever it is adopted, Men are almost as much asraid of being accused, as of being guilty, and especially grow very cautious how they interfere in public matters. We shall see presently how the Trial by Jury, peculiar to the English Nation, is admirably adapted to the nature of a free State.

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he shall at least mistrust, and in which his spirits, broken down by solitude, shall receive no support, either from the counsels of his friends, or the looks of those who shall offer up vows for his deliverance.

The fecurity of the individual, and the confciousness of that security, being then equally effential to the enjoyment of liberty, and necessary for the preservation of it, these two points must never be left out of sight, in the establishment of a judicial power; and I conceive that they necessarily lead to the following maxims.

In the first place I shall remind the reader of what has been laid down above, that the judicial authority ought never to reside in an independent Body; still less in him who is already the trustee of the executive power.

Secondly, the party accused ought to be provided with every possible means of defence. Above all things, the whole proceedings ought to be public. The Courts, and their different forms, must be such as to inspire respect, but never terror: and the cases ought to be so accurately ascertained, the limits so clearly marked, as that neither the executive power, nor the Judges, may ever hope to transgress them with impunity.

In fine, fince we must absolutely pay a price

for the advantage of living in fociety, not only by relinquishing some share of our natural liberty (a surrender which, in a wisely framed Government, a wise Man will make without reluctance) but even also by resigning part of even our personal security, in a word, since all judicial power is an evil, though a necessary one, no care should be omitted to reduce as far as possible the dangers of it.

And as there is however a period at which the prudence of Man must stop, at which the safety of the individual must be given up, and the law is to resign him over to the judgment of a few persons, that is, to speak plainly, to a decision in some sense arbitrary, it is necessary that this law should narrow as far as possible this sphere of peril, and so order matters, that when the subject shall happen to be summoned to the decision of his sate by the sallible conscience of a sew of his sellow-creatures, he may always find in them advocates, and never adversaries.

#### CHAP. XIII.

The Subject continued.

AFTER having offered to the reader, in the preceding Chapter, fuch general confiderations as I thought necessary, in order to convey a juster idea of the spirit of the criminal Judicature in England, and of the advantages peculiar to it, I now proceed to exhibit the particulars.

When a person is charged with a crime, the Magistrate, who is called in England a Justice of the Peace, iffues a warrant to apprehend him; but this warrant can be no more than an order for bringing the party before him: he must then hear him, and take down in writing his answers, together with the different informations. If it appears on this examination, either that the crime laid to the charge of the person who is brought before the Justice, was not committed, or that there is no just ground to suspect him of it, he must be set absolutely at liberty; if the contrary refults from the examination, the party accused must give bail for his appearance to answer to the charge; useless in capital cases, for then he must, for fafer custody, be really committed to prison, in order to take his trial at the next Seffions.

But this precaution, of requiring the examination of an accused person, previous to his imprifonment, is not the only care which the law has taken in his behalf; it has farther ordained, that the accusation against him should be again discusfed, before he can be exposed to the danger of a trial. At every fession the Sheriff appoints what is called the Grand Jury. This Assembly must be composed of more than twelve Men, and less than twenty-four; and is always formed out of the most considerable persons in the County. Its function is to examine the evidence that has been given in support of every charge: if twelve of those persons do not concur in the opinion that an accusation is well grounded, the party is immediately discharged; if, on the contrary, twelve of the grand Jury find the proofs fufficient, the prisoner is faid to be indicted, and is detained in order to go through the remaining proceedings.

On the day appointed for his Trial, the prifoner is brought to the bar of the Court, where the Judge, after caufing the bill of indictment to be read in his presence, must ask him how he would be tried: to which the prisoner answers, by God and my Country; by which he is understood to claim to be tried by a Jury, and to have all the judicial means of defence to which the

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law intitles him. The Sheriff then appoints what is called the Petty Jury: this must be composed of twelve Men, chosen out of the county where the crime was committed, and possessed of a landed income of ten pounds by the year: their declaration finally decides on the truth or falshood of the accusation.

As the fate of the prisoner thus entirely depends on the Men who compose this Jury, Justice requires that he should have a share in the choice of them; and this he has through the extensive right which the law has granted him, of challenging, or objecting to, such of them as he may think exceptionable,

These challenges are of two kinds. The first, which is called the challenge to the array, has for its object to have the whole pannel set aside: it is proposed by the prisoner when he thinks that the Sheriff who formed the pannel is not indifferent in the cause; for instance, if he thinks he has an interest in the prosecution, that he is related to the prosecutor, or in general to the party who pretends to be injured.

The fecond kind of challenges are called, to the Polls (in capita): they are exceptions propofed against the Jurors, severally, and are reduced to four heads by Sir Edward Coke. That which he calls propter bonoris respectum, may be proposed against against a Lord impannelled on a jury; or he might challenge himself. That propter defectum takes place when a Juror is legally incapable of serving that office, as, if he was an alien; if he had not an estate sufficient to qualify him, &c. That propter delictum has for its object to set aside any Juror convicted of such crime or misdemeanor as renders him infamous, as selony, perjury, &c. That propter affectum is proposed against a Juror who has an interest in the conviction of the prisoner: he, for instance, who has an action depending between him and the prisoner; he who is of kin to the prosecutor, or his counsel, attorney, or of the same society or corporation with him, &c. \*.

In fine, in order to relieve even the imagination of the prisoner, the law allows him, independently of the several challenges above mentioned, to challenge peremptorily, that is to say, without shewing any cause, twenty Jurors successively †.

When at length the Jury is formed, and they have taken their oath, the indictment is opened,

<sup>\*</sup> When a prisoner is an alien, one half of the Jurors must also be aliens; a Jury thus formed is called a Jury de medietate lingue.

<sup>†</sup> When these several challenges reduce too much the number of the Jurors on the Pannel, which is forty-eight, new ones are named on a writ of the Judge, who are named the Tales, from those words of the writ, decem or ofto tales.

and the profecutor produces the proofs of his accusation. But, unlike to the rules of the Civil Law, the witnesses deliver their evidence in the presence of the prisoner: the latter may put questions to them; he may also produce witnesses in his behalf, and have them examined upon oath. Lastly, he is allowed to have a Counsel to assist him, not only in the discussion of any point of law which may be complicated with the sact, but also in the investigation of the sact itself, and who points out to him the questions he ought to ask, or even asks them for him \*.

Such are the precautions which the law has devised for cases of common prosecutions; but in those for High Treason, and for misprission of treason, that is to say, for a conspiracy against the life of the King, or against the State, and for a concealment of it †, accusations which suppose a heat of party and powerful accusers, the law has provided for the accused party farther safeguards.

First, no person can be questioned for any treafon, except a direct attempt on the life of the King, after three years elapsed since the offence.

<sup>\*</sup> This last article, however, is not established by law, except in cases of treason; it is done only though custom and the indulgence of the Judges.

<sup>+</sup> The penalty of a misprision of treason is, the forseiture of all goods, and imprisonment for life.

2°. The accused party may, independently of his other legal grounds of challenging, peremptorily challenge thirty-five Jurors. 3°. He may have two Counsel to affift him through the whole course of the proceedings. 4°. That his witnesses may not be kept away, the Judges must grant him the fame compulfive process to bring them in, which they iffue to compel the evidences against him. 5°. A copy of his indictment must be delivered to him ten days at least before the trial, in the presence of two witnesses, and at the expence of five shillings; which copy must contain all the facts laid to his charge, the names, professions, and abodes, of the Jurors who are to be on the pannel, and of all the witnesses who are intended to be produced against him \*.

When, either in cases of high treason, or of inserior crimes, the prosecutor and the prisoner have closed their evidence, and the witnesses have answered to the respective questions both of the Bench, and of the Jurors, one of the Judges makes a speech, in which he sums up the facts which have been advanced on both sides. He points out to the Jury what more precisely constitutes the hinge of the question before them; and he

<sup>\*</sup> Stat. 7 Will. III. c. 3. and 7 Ann. c. 21. The latter was to be in force only after the death of the late Pretender.

gives them his opinion both with regard to the evidences that have been given, and to the point of law which is to guide them in their decision. This done, the Jury withdraw into an adjoining room, where they must remain without eating and drinking, and without fire, till they have agreed unanimously among themselves, unless the Court give a permission to the contrary. Their declaration or verdict (veredistum) must (unless they choose to give a special verdict) pronounce expressly, either that the prisoner is guilty, or that he is not guilty, of the fact laid to his charge. Lastly, the fundamental maxim of this mode of proceeding, is, that the Jury must be unanimous.

And as the main object of the institution of the Trial by a Jury, is to guard accused persons against all decisions whatsoever by Men invested with any permanent official authority \*, it is not only a settled principle that the opinion which the Judge delivers has no weight but such as a Jury choose to give it; but their verdict must besides comprehend the whole matter in trial, and decide as well upon the sact, as upon the point of law that may arise out of it: in other words, they must

<sup>&</sup>quot; Laws," as Junius fays extremely well, " are intended,

not to trust to what Men will do, but to guard against what

they may do."

pronounce both on the commission of a certain fact, and on the reason which makes such fact to be contrary to law \*.

This is even so effential a point, that a bill of indictment must expressly be grounded upon those two objects. Thus, an indictment for treason must charge, that the alledged sacts were committed with a treasonable intent (proditorie). An indictment for murder must express, that the sact has been committed with malice prepense, or aforethought. An indictment for robbery must charge, that the things were taken with an intention to rob, (animo furandi), &c. &c. †.

Juries

\* Unless they choose to give a special verdict.—When the 
"Jury," says Coke, "doubt of the law and intend to do 
"that which is just, they find the special matter, and the entry 
"is, Et super tota materia petunt discretionem Justiciariorum." 
Inst. iv. p. 41.—These words of Coke, we may observe, confirm beyond a doubt the power of the Jury to determine on the whole matter in trial: a power which in all constitutional views is necessary; and the more so, since a prisoner cannot in England challenge the Judge, as he can under the Civil Law, and for the same cause as he can a witness.

† The principle that a Jury is to decide both on the fact and the criminality of it, is so well understood, that if a verdict were so framed as only to have for its object the bare existence of the fact laid to the charge of the prisoner, no punishment could be awarded by the Judge in consequence of it. Thus, in the prosecution of Woodfall, for printing Junius's

letter

Iuries are even fo uncontrolable in their verdict, fo apprehensive has the Constitution been lest precautions to restrain them in the exercise of their functions, however specious in the beginning, might in the iffue be converted to the very destruction of the ends of that institution, that it is a repeated principle that a Juror, in delivering his opinion, is to have no other rule but his opinion itself, that is to fay, no other rule than the belief which refults to his mind from the facts alledged on both fides, from their probability, from the credibility of the witnesses, and even from all such circumstances as he may have a private knowledge of. Lord Chief Justice Hale expresses himself on this subject, in the following terms, in his History of the Common Law of England, chap. 12. § 11.

"In this recess of the Jury, they are to consider their evidence, to weigh the credi-bility of the witnesses, and the force and efficacy of their testimonies; wherein (as I before said) they are not precisely bound to the rules of the Civil Law, viz. to have two witnesses to prove every sact, unless it

letter to the King, the Jury brought in the following verdict, guilty of printing and publishing only; the consequence of which was the discharge of the prisoner.

"be in cases of treason, nor to reject one witness because he is single, or always to believe two witnesses, if the probability of the fact does upon other circumstances reasonably encounter them; for the Trial is not here simply by witnesses, but by fury: nay, it may so fall out, that a Jury upon their own knowledge may know a thing to be false that a witness swore to be true, or may know a witness to be incompetent or incredible, though nothing be objected against him—and may give their verdict accordingly.\*"

If the verdict pronounces not guilty, the prisoner is set at liberty, and cannot, on any pretence, be tried again for the same offence. If the verdict declares him guilty, then, and not till then, the Judge enters upon his function as a Judge, and pronounces the punishment which the law appoints †. But, even in this case.

 The fame principles and forms are observed in civil matters; only peremptory challenges are not allowed.

† When the party accused is one of the Lords temporal, he likewise enjoys the universal privilege of being judged by his Peers; though the Trial then differs in several respects. In the first place, as to the number of the Jurors: all the Peers are to perform the sunction of such, and they must be summoned at least twenty days beforehand. II. When the Trial takes place during the session, it is said to

case, he is not to judge according to his own discretion only; he must strictly adhere to the letter of the law; no constructive extension can be admitted; and however criminal a fact might in itself be, it would pass unpunished if it were found not to be positively comprehended in some one of the cases provided for by the law. The evil that may arise from the impunity of a crime, that is, an evil which a new law may instantly stop, has not by the English laws been considered as of magnitude sufficient to be put in comparison with the danger of breaking through a barrier on which so mightily depends the safety of the individual.

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be in the High Court of Parliament; and the Peers officiate at once as Jurors and Judges: when the Parliament is not fitting, the Trial is faid to be in the Court of the High Steward of England; an office which is not usually in being, but is revived on those occasions; and the High Steward performs the office of Judge. III. In either of these cases, unanimity is not required; and the majority, which must consist of twelve persons at least, is to decide.

\* I shall give here an instance of the scruple with which the English judges proceed upon occasions of this kind. Sir Henry Ferrers having been arrested by virtue of a warrant, in which he was termed a Knight, though he was a Baronet, Nightingale his servant took his part, and killed the Officer; but it was decided, that as the Warrant " was " an ill Warrant, the killing an Officer in executing that

" War-

To all these precautions taken by the law for the fafety of the Subject, one circumstance must be added, which indeed would alone juftify the partiality of the English Lawyers to their laws in preference to the Civil Law,-I mean the absolute rejection they have made of torture \*. Without repeating here what has been faid on this fubject by the admirable Author of the Treatise on Crimes and Punishments, I shall only observe, that the torture, in itself fo horrible an expedient, would, more efpecially in a free State, be attended with the most fatal confequences. It was absolutely necessary to preclude, by rejecting it, all attempts to make the pursuit of guilt an instrument of vengeance against the innocent. Even the convicted criminal must be spared, and a practice at all rates exploded, which might fo easily be made an instrument of endless vexation and persecution +.

For

<sup>&</sup>quot;Warrant, cannot be murder, because no good Warrant: "wherefore he was found not guilty of the murder and

<sup>&</sup>quot; manslaughter."-See Croke's Rep. P. III. p. 371.

<sup>\*</sup> Coke says (Inst. III. p. 35.) that when John Holland, Duke of Exeter, and William de la Poole, Duke of Sussolk, renewed, under Henry VI. the attempts made to introduce the Civil Law, they exhibited the torture as a beginning thereof. The instrument was called the Duke of Exeter's daughter.

<sup>†</sup> Judge Foster relates, from Whitlock, that the Bishop

For the farther prevention of abuses, it is an invariable usage, that the Trial be public. The prisoner neither makes his appearance, nor pleads, but in places where every body may have free entrance; and the witnesses when they give their evidence, the Judge when he delivers his opinion, the Jury when they give their verdict, are all under the public eye. Lastly, the Judge cannot change either the place, or the kind of punishment ordered by the law; and a Sheriff who should take away the life of a Man in a manner different from that which the law prescribes, would be prosecuted as guilty of murder.

of London having faid to Felton, who had affaffinated the Duke of Buckingham, " If you will not confess, you must go to the Rack." The Man replied, " If it must be so, " I know not who I may accuse in the extremity of the torture; Bishop Laud perhaps, or any Lord at this "Board."

" Sound sense, (adds Foster) in the mouth of an Enthuthusiast and a Russian.

Laud having proposed the Rack, the matter was shortly debated at the Board, and it ended in a reference to the Judges, who unanimously resolved that the Rack could not be legally used.

• And if any other person but the Sheriff, even the Judge himself, were to cause death to be inflicted upon a Man, though convicted, it would be deemed homicide. See Blackstone, book iv. chap. 14.

In a word, the Constitution of England being a free Constitution, demanded from that circumstance alone (as I should already have but too often repeated, if so fundamental a truth could be too often urged) extraordinary precautions to guard against the dangers which unavoidably attend the Power of inflicting punishments; and it is particularly when confidered in this light, that the Trial by Jury proves an admirable institution.

By means of it, the Judicial Authority is not only placed out of the hands of the Man who is vested with the Executive Authority-it is even out of the hands of the Judge himself. Not only, the person who is trusted with the public power cannot exert it, till he has as it were received the permission to that purpose, of shofe who are fet apart to administer the laws; but these latter are also restrained in a manner exactly alike, and cannot make the law speak, but when, in their turn, they have likewise received permission.

And those persons to whom the law has thus exclusively delegated the prerogative of deciding that a punishment is to be inflicted, those Men without whose declaration the Executive and the Judicial Powers are both thus bound down to inaction, do not form among

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themselves a permanent Body, who may have had time to study how their power can serve to promote their private views or interest: they are Men selected at once from among the people, who perhaps never were before called to the exercise of such a function, nor foresee that they ever shall be called to it again.

As the extensive right of challenging, effectually baffles, on the one hand, the secret practices of such as, in the sace of so many discouragements, might still endeavour to make the Judicial Power subservient to their own views, and on the other excludes all personal resentments, the sole affection which remains to influence the integrity of those who alone are intitled to put the public power into action, during the short period of their authority, is, that their own sate as subjects, is effentially connected with that of the Man whose doom they are going to decide.

In fine, such is the happy nature of this inflitution, that the Judicial Power, a power so formidable in itself, which is to dispose, without finding any resistance, of the property, honour, and life of individuals, and which, whatever precautions may be taken to restrain it, must in a great degree remain arbitrary, may be said in England, to exist,—to accomplish every intended end, — and to be in the hands of no-body \*.

In all these observations on the advantages of the English criminal laws, I have only considered it as connected with the Constitution, which is a free one; and it is in this view alone that I have compared it with the Jurisprudence received in other States. Yet, abstractedly from the weighty constitutional considerations which I have suggested, I think there are still other interesting grounds of pre-eminence on the side of the laws of England.

In the first place, they do not permit that a Man should be made to run the risque of a trial, but upon the declaration of twelve persons at least (the Grand Jury.) Whether he be in prison, or on his Trial, they never for an instant refuse free access to those who have either advice, or comfort, to give him; they even allow him to summon all who may have any thing to say in his sayour. And lastly, what is of very great importance, the witnesses against him must deliver their testimony in his presence;

<sup>\*</sup> The consequence of this Institution is, that no Man in England ever meets the Man of whom he may say, "That Man has a power to decide on my death or life." If we could for a moment forget the advantages of that Institution, we ought at least to admire the ingenuity of ir.

he may cross-examine them, and by one unexpected question, confound a whole system of calumny: indulgences these, all denied by the laws of other Countries.

Hence, though an accused person may be exposed to have his fate decided by persons (the Petty Jury) who possess not, perhaps all that fagacity which in some delicate cases it is particularly advantageous to meet with in a Judge, yet this inconvenience is amply compensated by the extensive means of defence with which the law, as we have feen, has provided him. If a Juryman does not possess that expertness which is the result of long practice, yet neither does he bring to Judgment that hardness of heart which is, more or less, also the consequence of it: and bearing about him the principles, let me fay, the unimpaired instinct of humanity, he trembles while he exercises the awful office to which he finds himself called, and in doubtful cases always decides for mercy.

It is to be farther observed, that in the usual course of things, Juries pay great regard to the opinions delivered by the Judges: that in those cases where they are clear as to the fact, yet find themselves perplexed with regard to the degree of guilt connected with it, they leave it, as has been said before, to be ascertained by the discre-

tion of the Judge, by returning what is called a Special Verdiet: that, whenever circumstances feem to alleviate the guilt of a person, against whom nevertheless the proof has been positive, they temper their verdict by recommending him to the mercy of the King; which feldom fails to produce at least a mitigation of the punishment: that, though a Man once acquitted, can never under any any pretence whatfoever be again brought into peril for the same offence, yet a new Trial would be granted, if he had been found guilty upon proofs ftrongly suspected of being false (Black. b. iv. c. 27.) Lastly, what distinguishes the laws of England from those of other Countries in a very honourable manner, is, that as the torture is unknown to them, fo neither do they know any more grievous punishment than the simple deprivation of life.

All these circumstances have combined to introduce such a mildness into the exercise of criminal Justice, that the trial by Jury is that point of their liberty to which the people of England are most thoroughly and universally wedded; and the only complaint I have ever heard uttered against it, has been by Men who, more sensible of the necessity of public order than alive to the seelings of humanity, think that too many offenders escape with impunity.

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### CHAP. XIV.

The Subject concluded. — Laws relative to Imprisonmett.

BUT what completes that sense of independence which the laws of England procure to every individual (a sense which is the noblest advantage attending liberty) is the greatness of their precautions upon the delicate point of imprisonment.

In the first place, by allowing, in most cases, of enlargement upon bail, and by prescribing, on that article, express rules for the Judges to follow, they have removed all pretexts which circumstances might afford of depriving a man of his liberty.

But it is against the Executive Power that the Legislature has, above all, directed its efforts: nor has it been but by slow degrees that it has been enabled to wrest from it a branch of power which enabled it to deprive the people of their Leaders, as well as to intimidate those who might be tempted to affirm the function; and which, having thus all efficacy of more odious means without the dangers of them, was perhaps the most formidable weapon with which it might attack public liberty.

The methods originally pointed out by the saws of England for the enlargement of a perfon unjustly imprisoned, were the writs of main-prize, de odio & atia, and de homine replegiando. Those writs, which could not be denied, were an order to the Sheriff of the County in which a person was confined, to inquire into the causes of his confinement; and, according to the circumstances of his case, either to discharge him completely, or upon bail.

But the most useful method, and which even, by being most general and certain, has tacitly abolished all the others, is writ of Habeas Corpus, so called because it begins with the words Habeas corpus ad subjictendum. This writ, being a writ of high prerogative, must issue from the Court of King's Bench: its effects extend equally to every County; and the King by it requires, or is understood to require the person who holds one of his subjects in custody, to carry him before the Judge, with the date of the confinement, and the cause of it, in order to discharge him, or continue to detain him, according as the Judge shall decree.

But this writ, which might be a resource in cases of violent imprisonment effected by individuals, or granted at their request, was but a seeble one, or rather was no resource at all against

the prerogative of the Prince, especially under the reigns of the Tudors, and in the beginning of that of the Stuarts. And even in the first years of Charles the First, the Judges of the King's Bench, who, in consequence of the spirit of the times, and of their holding their places durante bene placito, were constantly devoted to the Court, declared, "that they could not, upon a Habeas Corpus, ei"ther bail or deliver a prisoner, though committed without any cause affigned, in case he was committed by the special command of the King, or by the Lords of the Privy Coun"cil."

Those principles, and the mode of procedure which resulted from them, drew the attention of Parliament; and in the Act called the Petition of Right, passed in the third year of the reign of Charles the First, it was enacted, that no person should be kept in custody, in consequence of such imprisonments.

But the Judges knew how to evade the intention of this Act: they indeed did not refuse to discharge a Man imprisoned without a cause; but they used so much delay in the examination of the causes, that they obtained the full effect of an open denial of Justice.

The Legislature again interposed, and in the Act passed in the sixteenth year of the reign of Charles

Charles the First, the same in which the Star-Chamber was suppressed, it was enacted, that if any person be committed by the king himself in person, or by his Privy Council, or by any of the Members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of Habeas Corpus; and that the Judge shall thereupon, within three Court-days after the return is made, examine and determine the legality of such imprisonment."

This Act feemed to preclude every possibility of future evasion: yet it was evaded still; and, by the connivance of the Judges, the person who detained the prisoner could without danger, wait for a second, and a third writ, called an Alias and a Pluries, before he produced him.

All these different artifices gave at length birth to the samous Act of Habeas Corpus, passed in the thirtieth year of the reign of Charles the Second, which is considered in England as a second Great Charter, and has finally suppressed all the resources of oppression.

The principal articles of this Act are, to fix

<sup>\*</sup> The real title of this Act is, An Act for better securing the Subject, and for Prevention of Imprisonment beyond the Seas.

the different terms allowed for bringing a prisoner: those terms are proportioned to the distance; and none can in any case exceed twenty days.

2. That the Officer and Keeper neglecting to make due returns, or not delivering to the prisoner, or his agent, within six hours after demand, a copy of the warrant of commitment, or shifting the custody of the prisoner from one to another, without sufficient reason or authority (specified in the act), shall for the first offence forfeit one hundred pounds, and for the second two hundred, to the party grieved, and be disabled to hold his office.

3. No person, once delivered by Habeas Corpus, shall be recommitted for the same offence, on penalty of five hundred pounds.

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4. Every person committed for treason or felony, shall, if he require it, in the first week of the next term, or the first day of the next session, be indicted in that term or session, or else admitted to bail, unless the King's witnesses cannot be produced at that time: and if not indicted and tried in the second term or session, he shall be discharged of his imprisonment for such imputed offence.

5. Any of the twelve Judges, or the Lord Chan-

Chancellor, who shall deny a writ of Habeas Corpus, on fight of the warrant, or on oath, that the fame is refused, shall forfeit severally to the party grieved five hundred pounds.

6. No inhabitant of England (except perfons contracting, or convicts praying to be transported) shall be fent prisoner to Scotland, Ireland, Jerfy, Guernsey, or any place beyond the Seas, within or without the King's dominions, -or pain, that the party committing, his advisers, aiders, and affiftants, shall forfeit to the party grieved a sum not less than five hundred pounds, to be recovered with treble costs,-shall be disabled to bear any office of trust or profit,-fhall incur the penalties of a pramunire \*, and be incapable of the King's pardon.

<sup>\*</sup> The Statutes of pramunire, thus called from the writ for their execution, which begins with the words pramunire (for præmonere) facias, were originally defigned to oppose the usurpations of the Popes. The first was passed under the reign of Edward the First, and has been followed by several others, which even before the Reformation, established such effectual provisions as to draw upon one of them the epithet of Execrabile Statutum. The offences against which those Statutes were framed, were likewife diftinguished by the appellation of pramunire; and under that word were included in general all attempts to promote the Pope's authority at the expence of the King's. The punishment decreed for such cases, was also called a pramunire: it has fince been extend-

ed again to several other kinds of offence, and amounts to the imprisonment for life, and forfeiture of all goods and rents of lands during life." See Blackstone's Combook iv. ch. 8.

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BOOK

# BOOK II.

### CHAP. I.

Some Advantages peculiar to the English Constitution.

1. The Unity of the Executive Power.

WE have seen in former Chapters, the refources allotted to the different parts of the English Government for balancing each other, and how their reciprocal actions and re-actions produce the freedom of the Constitution, which is no more than an equilibrium between the ruling Powers of the State. I now propose to shew that the particular nature and functions of these same constituent parts of the Government, which give it so different an appearance from that of other free States, are moreover attended with peculiar and very great advantages, which have not hitherto been sufficiently observed.

The first peculiarity of the English Government, as a free Government, is its having a King,—its having thrown into one place the whole mass, if I may use the expression, of the Execu-

Executive Power, and having invariably and for ever fixed it there. By this very circumstance also has the depositum of it been rendered sacred and inexpugnable;—by making one great, very great Man, in the State, has an effectual check been put to the pretensions of those who otherwise would strive to become such, and disorders have been prevented, which, in all Republics, ever brought on the ruin of liberty, and, before it was lost, obstructed the enjoyment of it.

If we cast our eyes on all the States that ever were free, we shall see that the People ever turning their jealousy, as it was natural, against the Executive Power, but never thinking of the means of limiting it that has so happily taken place in England, never employed any other expedient besides the obvious one, of trusting that Power to Magistrates whom they appointed annually; which was in great measure the same as keeping the management of it to themselves. Whence it resulted that the People, who, whatever may be the frame of the Government, always possess, after all, the reality of power, thus uniting in themselves with this reality of power the actual exercise of it, in form as well as in fact,

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<sup>•</sup> The rendering that power dependent on the People for its supplies.—See on this subject Chapter vi. Book I.

constituted the whole State. In order therefore legally to disturb the whole State, nothing more was requisite than to put in motion a certain number of individuals.

In a State which is small and poor, an arrangement of this kind is not attended with any great inconveniences, as every individual is taken up with the care of providing for his subsistence, as great objects of ambition are wanting, and as evils cannot, in such a State, ever become much complicated. In a State that strives for aggrandisement, the difficulties and danger attending the pursuit of such a plan, inspire a general spirit of caution, and every individual makes a sober use of his rights as a Citizen.

But when, at length, those exterior motives come to cease, and the passions, and even the virtues, which they excited, thus become reduced to a state of inaction, the People turn their eyes back towards the interior of the Republic, and every individual, in seeking then to concern himself in all affairs, seeks for new objects that may restore him to that state of exertion which habit, he finds, has rendered necessary to him, and to exercise a share of power which, small as it is, yet statters his vanity.

As the preceding events must needs have given an influence to a certain number of Citizens, they

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avail themselves of the general disposition of the people, to promote their private views: the legislative power is thenceforth continually in motion; and as it is badly informed and falsely directed, almost every exertion of it is attended with some injury to the Laws, or the State.

This is not all; as those who compose the general Assemblies cannot, in consequence of their numbers, entertain any hopes of gratifying their own private ambition, or in general their own private passions, they at least seek to gratify their political caprices, and they accumulate the honours and dignities of the State on some favourite whom the public voice happens to raise at that time.

But, as in fuch a State there can be, from the irregularity of the determinations of the People, no fuch thing as a fettled course of measures, it happens that Men never can exactly tell the prefent state of public affairs. The power thus given away is already grown very great, before those for whom it was given so much as suspect it; and he himself who enjoys that power, does not know its full extent: but then, on the first opportunity that offers, he suddenly pierces through the cloud which hid the summit from him, and at once seats himself upon it. The People, on the other hand, no sooner recover sight of him, than they

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fee their Favourite now become their Master, and discover the evil, only to find that it is past remedy.

As this power, thus furreptitiously acquired, is destitute of the support both of the law and of the ancient course of things, and is even but indifferently respected by those who have subjected themselves to it, it cannot be maintained but by abusing it. The People at length succeed in forming somewhere a centre of union; they agree in the choice of a Leader; this Leader in his turn rises; in his turn also he betrays his engagements; power produces its wonted effects; and the Protector becomes a Tyrant.

This is not all; the same causes which have given a Master to the State, give it two, give it three. All those rival powers endeavour to swallow up each other; the State becomes a scene of endless quarrels and broils, and is in a continual convulsion.

If amidst such disorders the People retained their freedom, the evil must indeed be very great, to take away all the advantages of it; but they are slaves, and yet have not what in other countries makes amends for political servitude, I mean tranquillity.

In order to prove all these things, if proofs were deemed necessary, I would only refer the

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reader

reader to what every one knows of Pifistratus and Megacles, of Marius and Sylla, of Cæsar and Pompey. However, I cannot avoid translating a part of the speech which a Citizen of Florence addressed once to the Senate: the reader will find in it a kind of abridged story of all Republics; at least of those which, by the share allowed to the People in the Government, deserved that name, and which, besides, have attained a certain degree of extent and power.

"And that nothing human may be perpetual and stable, it is the will of Heaven that in all States whatsoever, there should arise certain destructive families, who are the bane and ruin of them. Of this our own Republic affords as many and more deplorable examples than any other, as it owes its misortunes not only to one, but to several such families. We had at first the Buondelmonti and the Huberti. We had afterwards the Donati and the Cerchi; and at present, (shameful and ridiculous conduct!) we are waging war among ourselves for the Ricci and the Albizzi.

"When in former times the Ghibelins were fuppressed, every one expected that the Guelss, being then satisfied, would have chosen to live in tranquillity; yet, but a little time had elapsed, when they again divided themselves into the

" factions of the Whites and the Blacks. When

" the Whites were suppressed, new parties arose,

" and new troubles followed. Sometimes bat-

" tles were fought in favour of the Exiles; and

" at other times, quarrels broke out between the

" Nobility and the People. And, as if refolved

" to give away to others what we ourselves nei-

" ther could, nor would, preaceably enjoy, we

" committed the care of our liberty fometimes to

" King Robert, and at other times to his brother,

" and at length to the Duke of Athens; never

" fettling nor refting in any kind of Government,

" as not knowing either how to enjoy liberty, or

" fupport servitude "."

The English Constitution has prevented the possibility of misfortunes of this kind. Not only by diminishing the power, or rather assual exercise of the power, of the People †, and making them share in the Legislature only by their Representatives, the irresistible violence has been avoided of those numerous and general Assemblies, which, on whatever side they throw their weight, bear down every thing. Besides, as the power of the People, when they have any kind of power, and

<sup>\*</sup> See the History of Florence, by Machiavel, lib. iii.

<sup>+</sup> We shall see in the sequel, that this diminution of the exercise of the power of the People has been attended with a great increase of their liberty.

know how to use it, is at all times really formidable, the Constitution has set a counterposse to it; and the Royal authority is this counterposse.

In order to render it equal to such a task, the Constitution has, in the first place, conferred on the King, as we have seen before, the exclusive prerogative of calling and dismissing the legislative Bodies, and of putting a negative on their refolutions.

Secondly, it has also placed on the side of the King the whole Executive Power in the Nation.

Lastly, in order to effect still nearer an equilibrium, the Constitution has invested the Man whom it has made the sole Head of the State, with all the personal privileges, all the pomp, all the majesty, of which human dignities are capable. In the language of the law, the King is Sovereign Lord, and the People are his subjects;—he is universal proprietor of the whole Kingdom;—he bestows all the dignities and places;—and he is not to be addressed but with the expressions and outward ceremony of almost Eastern humility. Besides, his person is sacred and inviolable; and any attempt whatsoever against it, is, in the eye of the law, a crime equal to that of an attack against the whole State.

In a word, fince, to have too exactly completed the equilibrium between the power of the People, and that of the Crown, would have been to facrifice the end to the means, that is, to have endangered liberty with a view to strengthen the Government, the deficiency which ought to remain on the side of the Crown, has at least been the appearance made up, by conferring on the King all that fort of strength that may result from the opinion and reverence of the people; and amidst the agitations which are the unavoidable attendants of liberty, the Royal power, like an anchor that resists both by its weight and the depth of its hold, insures a falutary steadiness to the vessel of the State.

The greatness of the prerogative of the King, by its thus procuring a great degree of stability to the State in general, has much lessened the possibility of the evils we have above described; it has even, we may say, totally prevented them by rendering it impossible for any Citizen even to rise to any dangerous greatness.

And to begin with an advantage by which the people eafily suffer themselves to be influenced, I mean that of birth, it is impossible for it to produce in England effects in any degree dangerous; for though there are Lords who, besides their wealth, may also boast of an illustrious descent, yet that advantage, being exposed to a continual comparison with the splendor of the Throne, dwindles almost to nothing; and in the gradation univer-

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The Ceremonial of the Court of England is even formed upon that principle. Those persons who are related to the King, have the title of Princes of the blood, and, in that quality, an indifputed pre-eminence over all other persons . Nay, the first Men in the Nation think it an honourable diffinction to themselves, to hold the different menial offices, or titles, in his Houshold. If we therefore were to fet aside the extensive and real power of the King, as well as the numerous means he possesses of gratifying the ambition and hopes of individuals, and were to confider only the Majesty of his title, and that kind of strength founded one public opinion, which refults from it, we should find the advantage so considerable, that to attempt to enter into a competition with it, with the bare advantage of high birth, which itself has no other foundation than public opinion, and that too in a very fubordinate degree, would be an attempt completely extravagant.

If this difference is fo great as to be thoroughly fubmitted to, even by those persons whose situation

<sup>\*</sup> This, by Stat. of the 31st of Hen. VIII. extends to the fons, grandfons, brothers, uncles, and nephews, of the reigning King.

might

might incline them to disown it, much more does it influence the minds of the people. And if, notwithstanding the value which every Englishman ought to set upon himself as a Man, and a free Man, there were any whose eyes were so very tender as to be dazzled by the appearance and the arms of a Lord, they would be totally blinded when they came to turn them towards the Royal Majesty.

The only Man, therefore, who, to those who are unacquainted with the Constitution of England, might at first fight appear in a condition to put the Government in danger, would be a Man who, by the greatness of his abilities and public services, might have acquired in a high degree the love of the people, and obtained a great influence in the House of Commons.

But how great foever this enthusiasm of the public may be, barren applause is the only fruit which the Man whom they favour can expect from it. He can hope neither for a Dictatorship, nor a Consulship, nor in general for any power under the shelter of which he may at once safely unmask that ambition with which we might suppose him to be actuated,—or, if we suppose him to have been hitherto free from any, grow insensibly corrupt. The only door which the Constitution leaves open to his ambition, of whatever

kind it may be, is a place in the administration, during the pleasure of the King. If, by the continuance of his services, and the preservation of his influence, he becomes able to aim still higher, the only door which again opens to him, is that of the House of Lords.

But this advance of the favourite of the people towards the establishment of his greatness, is at the same time a great step towards the loss of that power which might render him formidable.

In the first place, the People seeing that he is become much less dependent on their favour, begin, from that very moment, to lessen their attachment to him. Seeing him moreover diftinguished by privileges which are the object of their jealoufy, I mean their political jealoufy, and member of a body whose interests are frequently oppofite to their's, they immediately conclude that this great and new dignity cannot have been acquired but through a fecret agreement to betray them. Their favourite, thus fuddenly transformed, is going, they make no doubt, to adopt a conduct entirely opposite to that which has till then been the cause of his advancement and high reputation, and, in the compass of a few hours, completely renounce those principles which he has so long and fo loudly professed. In this certainly the People are mistaken; but yet neither would they

be wrong, if they feared that a zeal hitherto fo warm, fo conftant, I will even add, fo fincere, when it concurred with their Favourite's private interest, would, by being thenceforth often in opposition to it, become gradually much abated.

Nor is this all; the favourite of the people does not even find in his new acquired dignity, all the increase of greatness and eclat that might at first be imagined.

Hitherto he was, it is true, only a private individual; but then he was the object in which the whole Nation interested themselves; his actions and words were set forth in the public prints; and he every where met with applause and acclamation.

All these tokens of public favour are, I know, sometimes acquired very lightly; but they never last long, whatever people may say, unless real services are performed; now, the title of Benefactor to the Nation, when deserved, and universally bestowed, is certainly a very handsome title, and which does no-wise require the affishance of outward pomp to set it off. Besides, though he was only a Member of the inserior body of the Legislature, we must observe, he was the first; and the word first is always a word of very great moment.

But now that he is made Lord, all his great-

ness, which hitherto was indeterminate, becomes defined. By granting him privileges established and fixed by known laws, that uncertainty is taken from his lustre which is of so much importance in those things which depend on imagination; and his value is lowered, just because it is ascertained.

Besides, he is a Lord; but then there are several Men who possess but small abilities, and sew estimable qualifications, who also are Lords; his lot is, nevertheless, to be seated among them; the law places him exactly on the same level with them; and all that is real in his greatness, is thus lost in a crowd of dignities, hereditary and conventional.

Nor are these the only losses which the favourite of the People is to suffer. Independently of those great changes which he descries at a distance, he feels around him alterations no less visible, and still more painful.

Seated formerly in the Affembly of the Representative of the People, his talents and continual success had soon raised him above the level of his fellow Members; and, being carried on by the vivacity and warmth of the public favour, those who might have been tempted to set up as his competitors, were reduced to silence, or even became his supporters.

Admitted now into an Affembly of persons invested with a perpetual and hereditary title, he finds

finds Men hitherto his superiors,—Men who see with a jealous eye the shining talents of the bomo novus, and who are firmly resolved, that after having been the leading Man in the House of Commons, he shall not be the first, in their's.

In a word, the fuccess of the favourite of the People was brilliant, and even formidable; but the Constitution, in the very reward it prepares for him, makes him find a kind of Ostracism. His advances were sudden, and his course rapid; he was, if you please, like a torrent ready to bear down every thing before it; but this torrent is compelled, by the general arrangement of things, finally to throw itself into a vast reservoir, where it mingles, and loses its force and direction.

I know it may be faid, that, in order to avoid the fatal step which is to deprive him of so many advantages, the favourite of the People ought to refuse the new dignity which is offered to him, and wait for more important successes, from his eloquence in the House of Commons, and his influence over the People.

But those who give him this counsel, have not fufficiently examined it. Without doubt there are Men in England, who in their present pursuit of a project which they think essential to the public good, would be capable of resusing for a while a dignity which would deprive their virtue of op-

portunities of exerting itself, or might more or less endanger it: but woe to him who should perfift in fuch a refufal, with any pernicious defign! and who, in a Government where liberty is established on so solid and extensive a basis, should endeavour to make the People believe that their fate depends on the persevering virtue of a fingle Citizen. His ambitious views being at last discovered (nor could it be long before they were fo), his obstinate resolution to move out of the ordinary course of things, would indicate aims, on his part, of fuch an extraordinary nature, that all Men whatever, who have any regard for their Country, would instantly rise up from all parts to oppose him, and he must fall, overwhelmed with fo much ridicule, that it would be better for him to fall from the Tarpeian rock \*.

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\* The reader will perhaps object, that no Man in England can possibly entertain such views as those I have suggested here: this is precisely what I intended to prove. The essential advantage of the English Government above all those that have been called free, and which in many respects were but apparently so, is, that no person in England can entertain so much as a thought of his ever rising to the level of the Power charged with the execution of the Laws. All Men in the State, whatever may be their rank, wealth, or influence, are thoroughly convinced that they must in reality as well as in name, continue to be Subjects; and are thus compelled really to love, to defend, and promote, those laws which se-

In fine, even though we were to suppose that the new Lord might, after his exaltation, have preserved all his interest with the People, or what would be no less difficult, that any Lord whatever could, by dint of his wealth and high birth, rival the splendor of the Crown itself, all these advantages, how great foever we may suppose them, as they would not of themselves be able to confer on him the least executive authority, must for ever remain mere showy unsubstantial advantages. Finding all the active powers in the State concentered in that very feat of power which we suppose him inclined to attack, and there secured by formidable provisions, his influence must always evaporate in ineffectual words; and after having advanced himself, as we suppose, to the very foot of the Throne, finding no branch of independent power which we might appropriate to himself, and thus at last give a reality to his political importance, he would foon fee it, however great it might have at first appeared, decline and die away.

God forbid, however, that I should mean that the People of England are so fatally tied down to inaction, by the nature of their Government, that they cannot, in times of oppression, find means of

cure the liberty to the subject. This latter observation will be again introduced in the sequel.

appointing a Leader. No; I only meant to fay that the laws of England open no door to those accumulations of power, which have been the ruin of so many Republics; that they offer to the ambitious no possible means of taking advantage of the inadvertence, or even the gratitude, of the People, to make themselves their Tyrants; and that the public power, of which the King has been made the exclusive depositary, must remain unshaken in his hands, so long as things continue to keep in the legal order; which, it may be observed, is a strong inducement to him constantly to endeavour to maintain them in it \*.

CHAP.

\* There are several events, in the English History, which put in a very strong light this idea of the stability which the power of the Crown gives to the State.

One, is the facility with which the great Duke of Marlborough, and his party at home, were removed from their feveral employments. Hannibal, in circumftances nearly fimilar, had continued the war against the will of the Senate of Carthage: Cæsar had done the same in Gaul; and when at last he was expressly required to deliver up his commission, he marched his army to Rome, and established a military despotism. But the Duke, though surrounded, as well as the above named Generals, by a victorious army, and by Allies in conjuction with whom he had carried on such a successful war, did not even hesitate to surrender his commission. He knew that all his soldiers were inseparably prepossessed in favour of that Power against which he must have revolted: he

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The Subject concluded .- The Executive Power is more easily confined when it is ONE.

A NOTHER great advantage, and which one would not at first expect, in this unity of the public power in England, -in this union. and, if I may so express myself, in this coacervation, of all the branches of the Executive au-

knew that the same prepossessions were deeply rooted in the minds of the whole Nation, and that every thing among them concurred to support the same Power: he knew that the very nature of the claims he must have set up, would instantly have made all his Officers and Captains turn themselves against him, and, in short, that in an enterprise of that nature. the arm of the sea he had to repass, was the smallest of the obstacles he would have to encounter.

The other event I shall mention here, is that of the Revolution of 1689. If the long established power of the Crown had not beforehand prevented the people from accustoming themselves to fix their eyes on some particular Citizens, and in general had not prevented all Men in the State from attainingany too confiderable degree of power and greatness, the expulsion of James II. might have been followed by events fimilar to those which took place at Rome after the death of Cæfar.

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thorny, is the greater facility it affords of reftraining it.

In those States where the execution of the laws is intrusted to several different hands, and to each with different titles and prerogatives, such divifion, and the changeableness of measures which must be the consequence of it, constantly hide the true cause of the evils of the State: in the endless fluctuation of things, no political principles have time to fix among the People: and public misfortunes happen, without ever leaving behind them any useful lesson. of all the branche

At fometimes military Tribunes, and at others, Confuls, bear an absolute fway; -- sometimes Patricians usurp every thing, and at other times, those who are called Nobles \* ;- fometimes, the People are oppressed by Decemvirs, and at others by Dictators.

Tyranny, in such States, does not always beat

The capacity of being admitted to all places of public trult, at length gained by the Plebeians, having rendered nfeless the old distinction between them and the Patricians, a coalition was then effected between the great Plebeians, or Commoners, who got into these places, and the ancient Patricans. Hence a new Class of Men arose, who were called Nobiles and Nobilitas. These are the words by which Livy, after that period, constantly distinguishes those Men and families. who were at the head of the State. 200 30 10005 thom:

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down the fences that are set around it; but it leaps over them. When men think it confined to one place, it starts up again in another;—it mocks the efforts of the People, not because it is invincible, but because it is unknown;—seized by the arm of a Hercules, it escapes with the changes of a Proteus.

But the indivisibility of the Public power in England has constantly kept the views and efforts of the People directed to one and the same object; and the permanence of that power has also given a permanence and a regularity to the precautions they have taken to restrain it.

Constantly turned towards that ancient fortress, the Royal power, they have made it for seven centuries, the object of their fear; with a watchful jealousy they have considered all its parts—they have observed all its outlets—they have even pierced the earth to explore its secret avenues, and subterraneous works.

United in their views by the greatness of the danger, they regularly formed their attacks. They established their works, first at a distance; then brought them successively nearer; and, in short, raised none but what served afterwards as a foundation or defence to others.

After the great Charter was established, forty successive confirmations strengthened it.

The Act called the Petition of Right, and that passed in the sixteenth year of Charles the First, then followed: some years, after the Habeas Corpus Act was established; and the Bill of Rights made at length its appearance. In fine, whatever the circumstances may have been, they always had, in their efforts, that inestimable advantage of knowing with certainty, the general seat of the evils they had to defend themselves against; and each calamity, each particular eruption, by pointing out some weak place, has ever gained a new bulwark to public Liberty.

To fay all in three words; the Executive power in England is formidable, but then it is for ever the fame; its resources are vast, but their nature is at length known; it has been made the indivisible and inalienable attribute of one person alone, but then all other persons, of whatever rank or degree, become really interested to restrain it within its proper bounds.

<sup>\*</sup> This last advantage of the greatness and indivisibility of the executive power, viz. the obligation it lays upon the greatest Men in the State, sincerely to unite in a common cause with the people, will be more amply discussed hereafter, when a more particular comparison between the English Government and the Republican form, shall be offered to the Reader.

### CHAP. III.

A second Peculiarity.—The Division of the Legislative Power.

THE fecond peculiarity which England, as an undivided State and a free State. exhibits in its Constitution, is the division of its Legislature. But, in order to make the reader more fensible of the advantages of this division, it is necessary to defire him to attend to the following confiderations.

It is, without doubt, abfolutely necessary, for fecuring the Constitution of a State, to restrain the Executive power; but it is still more necessary to restrain the Legislative. What the former can only do by fuccessive steps (I mean fubvert the laws) and through a longer or shorter train of enterprises, the latter does in a moment. As its bare will can give being to the laws; fo its bare will can also annihilate them: and, if I may be permitted the expreffion,—the Legislative power can change the Constitution, as God created the light.

In order therefore to infure stability to the Constitution of a State, it is indispensably necessary to restrain the Legislative authority.

But here we must observe a difference between the Legislative and Executive powers. The latter may be confined, and even is the more easily so, when undivided: the Legislative, on the contrary, in order to its being restrained, should absolutely be divided. For, whatever laws it may make to restrain itself, they never can be, relatively to it, any thing more than simple resolutions: as those bars which it might erest to stop its own motions, must then be within it, and rest upon it, they can be no bars. In a word, the same kind of impossibility is sound, to six the Legislative power when it is one, which Archimedes objected against his moving the Earth\*.

Nor does such a division of the Legislature only render it possible for it to be restrained, since each of those parts into which it is divided, can then serve as a bar to the motions of the others, but it even makes it to be actually so restrained. If it has been divided into only two parts, it is probable that they will not in all cases unite, either for doing, or undoing:—if it has been divided into three parts, the chance that no changes will be made, is thereby greatly increased.

Nay more; as a kind of point of honour will naturally take place between these different parts

<sup>.</sup> He wanted a spot whereupon to fix his instruments.

of the Legislative, they will therefore be led to offer to each other only such propositions as will at least be plausible; and all very prejudicial changes will thus be prevented, as it were, before their birth.

If the Legislative and Executive powers differ so greatly with regard to the necessity of their being divided, in order to their being restrained, they differ no less with regard to the other consequences arising from such division.

The division of the Executive power necesfarily introduces actual oppositions, even violent ones, between the different parts into which it has been divided; and that part which in the iffue fucceeds fo far as to abforb, and unite in itself, all the others, immediately sets itself above the laws. But those oppositions which take place, and which the public good requires should take place, between the different parts of the Legislature, are never any thing more than oppositions between contrary opinions and intentions; all is transacted in the regions of the understanding; and the only contention that arises is wholly carried on with those inoffensive weapons; affents and diffents, ayes and noes. easte double, by the King allowing the P

Besides, when one of these parts of the Legislature is so successful as to engage the others

to adopt its proposition, the result is, that a law takes place which has in it a great probability of being good: when it happens to be deseated, and sees its proposition rejected, the worst that can result from it is, that a law is not made at that time; and the loss which the State suffers thereby, reaches no farther than the temporary setting aside of some more or less useful speculation.

In a word, the refult of a division of the Executive power, is either a more or less speedy establishment of the right of the strongest, or a continued state of war \*:—that of a division of the Legislative power, is either truth, or general tranquility.

The following maxim will therefore be admitted. That the laws of a State may be permanent, it is requisite that the Legislative power should be divided:—that they may have weight, and continue in force, it is necessary that the Executive power should be one.

\* Every one knows the frequent hostilities that took place between the Roman Senate and the Tribunes. In Sweden there have been continual contentions between the King and the Senate, in which they have overpowered each other by turns. And in England, when the Executive power became double, by the King allowing the Parliament to have a perpetual and independent existence, a civil war almost immediately followed.

If

If the reader conceived any doubt as to the truth of the above observations, he need only cast his eyes on the history of the proceedings of the English Legislature down to our times, to find a proof of them. He would be furprifed to fee how little variation there has been in the political laws of this Country, especially during the last hundred years, though, it is most important to observe, the Legislature has been as it were in a continual state of action, and, no dispassionate Man will deny, has generally promoted the public good. Nay, if we except the Act passed under William III. by which it had been enacted, that Parliaments should sit no longer than three years, and which was repealed by a fubsequent Act, under George I. which allowed them to fit for feven years, we shall not find that any law, which may really be called Constitutional, and which has been enacted fince the Restoration, has been changed afterwards.

Now, if we compare this steadiness of the English Government with the continual subversions of the Constitutional laws of some ancient Republics, with the imprudence of some of the laws passed in their assemblies, and

<sup>\*</sup> The Athenians, among other laws, had enacted one to forbid applying a certain part of the public revenues to any

with the still greater inconsiderateness with which they sometimes repealed the most falutary regulations, as it were the day after they had been enacted,—if we call to mind the extraordinary means to which the Legislature of those Republics, at times sensible how its very power was prejudicial to itself and to the State, was obliged to have recourse, in order, if possible, to tie its own hands, we shall remain convinced of the great advantages which attend the Constitution of the English Legislature.

other use than the expences of the Theatres and public Shews.

\* In some ancient Republics, when the Legislature wished to render a certain law permanent, and at the same time mistrusted their own future wisdom, they added a clause to it, which made it death to propose the revocation of it. Those who afterwards thought such revocation necessary to the public welfare, relying on the mercy of the People, appeared in the public Assembly with an halter about their necks.

† We shall perhaps have occasion to observe, hereafter, that the true cause of the equability of the operations of the English Legislature, is the opposition that happily takes place between the different views and interests of the several bodies that compose it: a consideration this, without which all political inquiries are no more than airy speculations, and is the only one that can lead to useful practical conclusions.

Nor

Nor is this division of the English Legislature accompanied (which is indeed a very fortunate circumstance) by any actual division of the Nation: each constituent part of it possesses strength sufficient to insure respect to its resolutions, yet no real division has been made of the forces of the State. Only a greater proportional share of all those distinctions which are calculated to gain the reverence of the People, has been allotted to those parts of the Legislature which could not possess their considence, in so high a degree as the others; and the inequalities in point of real strength between them, have been made up by the magic of dignity.

Thus, the King, who alone forms one part of the Legislature, has on his fide the majesty of the kingly title: the two Houses are, in appearance, no more than Councils entirely dependent on him; they are bound to follow his person; they only meet, as it seems, to advise him; and never address him but in the most solemn and respectful manner.

As the Nobles, who form the fecond order of the Legislature, bear, in point both of real weight and numbers, no proportion to the body of the People\*, they have received

<sup>\*</sup> It is for want of having duly confidered this subject, that Mr. Rousseau exclaims, somewhere, against those who

as a compensation, the advantage of personal honours, and of an hereditary title.

Besides, the established ceremonial gives to their Assembly a great pre-eminence over that of the Representatives of the People. They are the upper House, and the others are the lower House. They are in a more special manner considered as the King's Council, and it is in the place where they assemble that his Throne is placed.

When the King comes to the Parliament, the Commons are fent for, and make their appearance at the bar of the House of Lords. It is moreover before the Lords, as before their Judges, that the Commons bring their impeachments. When, after passing a bil in their own House, they send it to the Lords to desire their concurrence, they always order

when they speak of General Estates of France, "dare to a to call the people the third Estate." At Rome, where all the order we mention was inverted,—where the fasces were laid down at the feet of the People,—and where the Tribunes, whose function, like that of the King of England, was to oppose the establishment of new laws, were only a subordinate kind of Magistracy, many disorders followed. In Sweden, and in Scotland (before the union), faults of another kind prevailed: in the former kindom, for instance, an overgrown body of two thousand Nobles frequently over-ruled both King and People.

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a number of their own Members to accompany it \*: whereas the Lords send down their bills to them, only by some of the Assistants of their House †. When the nature of the alterations which one of the two Houses desires to make in a bill sent to it by the other, renders a conference between them necessary, the Deputies of the Commons to the Committee which is then formed of Members of both Houses, are to remain uncovered. Lastly, those bills which (in which ever of the two Houses they have originated) have been agreed to by both, must be deposited in the House of Lords, there to remain till the Royal pleasure is signified.

Besides, the Lords are Members of the Legislature by virtue of a right inherent in their persons, and they are supposed to sit in Parliament on their own account, and for the support of their own interests. In consequence of this they have the privilege of giving their

<sup>\*</sup> The Speaker of the House of Lords must come down from the woolpack to receive the bills which the Members of the Commons bring to their House.

<sup>†</sup> The twelve Judges and the Masters in Chancery. There is also a ceremonial established with regard to the manner and marks of respect, with which those two of them, who are sent with a bill to the Commons, are to deliver it.

votes by proxies; and, when any of them diffent from the resolutions of their House, they may enter a protest against them, containing the reasons of their particular opinion. In a word, as this part of the Legislature is destined frequently to balance the power of the People, what it could not receive in real strength, it has received in outward splendor and greatness; so that, when it cannot resist by its weight, it overawes by its apparent magnitude.

In fine, as these various prerogatives by which the component parts of the Legislature are thus made to balance each other, are all intimately connected with the fortune of State, and flourish and decay according to the viciffitudes of public prosperity or adversity, it thence follows, that, though difference of opinions may at some times take place between those parts, there can scarcely arise any, when the general welfare is really in question. And when, to resolve the doubts that may arise in political speculations of this kind, we cast our eyes on the debates of the two Houses for a long succession of years, and see the nature of the laws which have been proposed, of those which

<sup>†</sup> The Commons have not that privilege, because they are themselves proxies for the People.—See Coke's Inst. 4. p. 41.

have paffed, and of those which have been rejected, as well as of the arguments that have been urged on both fides, we shall remain convinced of the goodness of the principles on which the English Legislature is formed.

# CHAP. IV.

A third Advantage peculiar to the English Government. The Business of proposing Laws, lodged in the Hands of the People.

A Third circumstance which I propose show to be peculiar to the English Government, is the manner in which the respective offices of the three component parts of the Legislature have been divided, and allotted to each of them.

If the Reader will be pleased to observe, he will find that in most of the ancient free States, the share of the People in the business of Legislation, was to approve, or reject, the propositions which were made to them, and to give the final fanction to the laws. The function of those Persons, or in general those bodies, who were intrusted with the Executive power, was to prepare and frame the Laws, and then

to propose them to the People: and in a word, they possessed that branch of the Legislative power which may be called the *initiative*, that is, the prerogative of putting that power in action.

This initiative, or exclusive right of proposing, in Legislative assemblies, attributed to the Magistrates, is indeed very useful, and perhaps even necessary, in States of a republican form, for giving a permanence to the laws, as well as for preventing the disorders and struggles for power which have been mentioned before; but upon examination we shall find that this expedient is attended with inconveniences

This power of previously considering and approving such laws as were afterwards to be propounded to the People, was, in the first times of the Roman Republic, constantly exercised by the Senate: laws were made, Populi justu, ex authoritate Senatus. Even in cases of elections, the previous approbation and autoritas of the Senate, with regard to those persons who were offered to the suffrages of the People, was required. Tum enim non gerebat is magisfratum qui ceperat, si Patres authores non erant satii. Cic. pro Plancio, 3.

At Venice the Senate also exercises powers of the same kind, with regard to the Grand Council or Assembly of the Nobles. In the Canton of Bern, all propositions must be discussed in the Little Council, which is composed of twenty-seven Members, before they are laid before the Council of the Tavo bundred, in whom resides the sovereignty of the whole

of little less magnitude than the evils it is meant to remedy.

These Magistrates, or Bodies, at first indeed apply frequently to the Legislature for a grant of fuch branches of power as they dare not of themselves assume, or for the removal of such obstacles to their growing authority as they do not yet think it fafe for them peremptorily to fet aside. But when their authority has at length gained a fufficient degree of extent and stability, as father manifestations of the will of the Legislature could then only create obstructions to the exercise of their power, they begin to consider the Legislature as an enemy whom they must take great care never to rouse. They consequently convene the Assembly of the People as feldom as they can. When they do it, they carefully avoid propoling any thing favourable to public liberty. Soon they even entirely cease to convene the Assembly at all; and the People, after thus lofing

whole Canton. And in Geneva, the law is, " that nothing " shall be treated in the General Council or Assembly of the "Citizens, which has not been previously treated and approved in the Council of the Two bundred; and that " nothing shall be treated in the Two bundred, which has not been previously treated and approved in the Council of the Twenty-five."

the power of legally afferting their rights, are exposed to that which is the highest degree of political ruin, the loss of even the remembrance of them, unless some indirect means are found, by which they may from time to time give life to their dormant privileges; means which may be found, and succeed pretty well in small States, where provisions can more easily be made to answer their intended ends, but in States of considerable extent, have always been found, in the event, to give rise to disorders of the same kind with those which were at first intended to be prevented.

But as the capital principle of the English Constitution totally differs from that which forms the basis of Republican Governments, so is it capable of procuring to the People advantages that are found to be unattainable in the latter. It is the people in England, or at least those who represent them, who possess the initiative in Legislation, that is to say, who perform the office of framing laws, and proposing them. And among the many circumstances in the English Government, which would appear entirely new to the Politicians of antiquity, that of seeing the person intrusted with the Executive power bear that

that share in Legislation which they looked upon as being necessarily the lot of the People, and the People that which they thought the indispensable office of its Magistrates, would not certainly be the least occasion of their surprise.

I foresee that it will be objected, that, as the King of England has the power of diffolving, and even of not calling Parliaments, he is hereby possessed of a prerogative which in fact is the same with that which I have just now reprefented as being fo dangerous.

To this I answer, that all circumstances ought to be combined together. Doubtless, if the Crown had been under no kind of dependence whatever on the people, it would long fince have freed itself from the obligation of calling their Representatives together; and the British Parliament, like the National Assemblies of feveral other Kingdoms, would most likely have no existence now, except in History.

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But, as we have above feen, the necessities of the State, and the wants of the Sovereign himself, put him under a necessity of having frequently recourse to his Parliament; and then the difference may be feen between the prerogative of not calling an Affembly, when powerful causes nevertheless render such a measure necessary, and the exclusive right, when an Affembly is convened, of proposing laws to it.

In the latter case, though a Prince, let us even suppose, in order to save appearances, might condescend to mention any thing besides his own wants, it would be at most to propose the giving up of some branch of his prerogative upon which he set no value, or to reform such abuses as his inclination does not lead him to imitate; but he would be very careful not to touch any points which might materially affect his authority.

Besides, as all his concessions would be made, or appear to be made, of his own motion, and would in some measure seem to spring from the activity of his zeal for the public welfare, all that he might offer, though in sact ever so inconsiderable, would be represented by him as grants of the most important nature, and for which he expects the highest gratitude. Lastly, it would also be his province to make restrictions and exceptions to laws thus proposed by himself; he would also be the person who were to chuse the words to express them, and it would not be reasonable to expect that he would give himself any great trouble to avoid all ambiguity.

But

<sup>\*</sup> In the beginning of the existence of the House of Commons, bills were presented to the King under the form of Petitions. Those to which the King assented, were register-

But the Parliament of England is not, as we faid before, bound down to wait paffively and in filence for fuch laws as the Executive power may condescend to propose to them. At the opening of every Session, they of themselves take into their hands the great book of the State; they open all the pages, and examine every article.

When they have discovered abuses, they proceed to enquire into their causes:—when these abuses arise from an open disregard of the laws, they endeavour to strengthen them; when they proceed from their insufficiency, they remedy the evil by additional provisions.

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ed among the rolls of Parliament, with his answer to them; and at the end of each Parliament, the Judges formed them into Statutes. Several abuses having crept into that method of proceeding, it was ordained that the Judges should in future make the Statute before the end of every Session. Lastly, as even that became, in process of time, insufficient, the present method of framing bills was established; that is to say, both Houses now frame the Statutes in the very form and words in which they are to stand when they received the Royal assent.

• No popular Assembly ever enjoyed the privilege of starting, canvassing, and proposing new matter, to such a degree as the English Commons. In France, when their General Estates were allowed to sit, their remonstrances were

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little

Nor do they proceed with less regularity and freedom, in regard to that important object, subsidies. They are to be the sole Judges of the quantity of them, as well as of the ways and means of raising them; and they need not come to any resolution with regard to them, till they see the safety of the Subject completely provided for. In a word, the making of laws, is not, in such an arrangement of things, a gratuitous contract, in which the People are to take

little regarded, and the particular Estates of the Provinces dare now hardly present any. In Sweden, the Power of proposing new subjects was lodged in an Assembly called the Secret Committee, composed of Nobles, and a few of the Clergy; and is now possessed by the King. In Scotland, until the Union, all propositions to be laid before the Parliament, were to be framed by the persons called the Lords of the Articles. In regard to Ireland, all bills must be prepared by the King in his Privy Council, and are to be laid before the Parliament by the Lord Lieutenant, for their affent or diffent: only, they are allowed to discuss, among them, what they call Heads of a Bill, which the Lord Lieutenant is defired afterwards to transmit to the King, who selects out of them what clauses he thinks proper, or fets the whole aside; and is not expected to give at any time, any precise answer to them. And in republican Governments. Magistrates are never at rest till they have entirely secured to themselves the important privilege of proposing; nor does this follow merely from their ambition; it is also the confequence of the fituation they are in, from the principles of that mode of Government.

just what is given them, and as it is given them:
—it is a contract in which they buy and pay,
and in which they themselves settle the different
conditions, and furnish the words to express
them.

The English Parliament have given a still greater extent to their advantages on so important a subject. They have not only secured to themselves a right of proposing laws and remedies, but they have also prevailed on the Executive power to renounce all claim to do the same. It is even a constant rule that neither the King nor his Privy Council can make any amendments to the bills preferred by the two Houses; but the King is merely to accept or reject them: a provision this, which, if we pay a little attention to the subject, we shall find to have been also necessary for completely securing the freedom and regularity of the parliamentary deliberations.

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The King indeed at times fends messages to either House; and nobody, I think, can wish that no means of intercourse should exist between him and his Parliament. But these messages are always expressed in very general words: they are only made to desire the House to take certain subjects into their consideration: no particular articles or clauses are expressed; the Commons are not to declare, at any settled time, any solemn acceptation or

I indeed confess that it seems very natural, in the modelling of a State, to intrust this very important office of framing laws, to those persons who may be supposed to have before acquired experience and wisdom, in the management of public affairs. But events have unfortunately demonstrated, that public employments and power improve the understanding of Men in a less degree than they pervert their views; and it has been found in the issue that the effect of the regulation which, at first fight, seems so perfectly. consonant with prudence, is to confine the People to a mere passive and desensive share in the Legislation, and to deliver them up to the continual enterprizes of those who, at the same time that they are under the greatest temptations to deceive them, possess the most powerful means of effecting it.

If we cast our eyes on the History of the ancient Governments, in those times when the per-

rejection of the proposition made by the King; and, in short, the House follows the same mode of proceeding, with respect to such messages, as they usually do in regard to petitions presented by private individuals. Some Member makes a motion upon the subject expressed in the King's message; a bill is framed in the usual way; it may be dropt at every stage of it; and it is never the proposal of the Crown, but the motions of some of their own Members, which the House discuss, and finally accept or reject.

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fons entrusted with the Executive power were still in a state of dependence on the Legislature, and consequently frequently obliged to have recourse to it, we shall see almost continual instances of selfish and insidious laws proposed by them to the Assemblies of the people.

And those Men in whose wisdom the law had at first placed so much considence, became, in the issue, so lost to all sense of shame and duty, that when arguments were sound to be no longer sufficient, they had recourse to sorce; the legislative Assemblies became so many fields of battle, and their power, a real calamity.

I know very well, however, that there are other important circumstances besides those I have just mentioned, which would prevent disorders of this kind from taking place in England. But, on the other hand, let us call to mind that the person who, in England, is invested with the Executive authority, unites in himself the whole public power and majesty. Let us represent to ourselves the great and sole Magistrate of the Nation, pressing the acceptance of those laws which he had proposed, with a vehemence suited to the

<sup>\*</sup> I particularly mean here, the circumstance of the People having certainly delegated their power to their Representatives: the consequences of which Institution will be discussed in the next Chapter.

usual importance of his deligns, with the warmth of Monarchical pride, which must meet with no refusal, and exerting for that purpose all his immense resources.

It was therefore a matter of indispensable neceffity, that things should be settled in England in the manner they are. As the moving springs of the Executive power are, in the hands of the King, a kind of facred depositum, fo are those of the Legislative Power in the hands of the two Houses. The King must abstain from touching them, in the same manner as all the subjects of the kingdom are bound to fubmit to his prerogatives. When he fits in Parliament, he has left, we may fay, his executive power without doors, and can only affent or diffent. If the Crown had been allowed to take an active part in the business of making laws, it would foon have rendered useless the other branches of the Legislature.

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## CHAP. V.

In which an Inquiry is made, whether it would be an Advantage to public Liberty, that the Laws should be enacted by the Votes of the People at large.

BUT it will be said, whatever may be the wisdom of the English Laws, how great soever their precautions may be with regard to the safety of the individual, the People, as they do not themselves expressly enact them, cannot be looked upon as a free People. The Author of the Social Contrast carries this opinion even farther; he says, that "though the People of England" think they are free, they are much mistaken;

" they are fo only during the election of Mem-

" bers for Parliament: as foon as these are elect-

" ed, the People are flaves—they are nothing "."

Before I answer this objection, I shall observe, that the word *Liberty* is one of those which have been most misunderstood or misapplied.

Thus, at Rome, where that class of Citizens who were really Masters of the State, were senfible that a lawful regular authority, once trusted

<sup>.</sup> See M. Rousseau's Social Contract, chap. xv.

to a fingle Ruler, would put an end to their tyranny, they taught the People to believe, that, provided those who exercised a military power over them, and overwhelmed them with insults, went by the names of Consules, Distatores, Patricii, Nobiles, in a word, by any other appellation than that horrid one of Rex, they were free, and that such a valuable situation must be preserved at the price of every calamity.

In the same manner, certain Writers of the present age, misled by their inconsiderate admiration of the Governments of ancient times, and perhaps also by a defire of prefenting lively contrasts to what they call the degenerate manners of our modern times, have cried up the governments of Sparta and Rome, as the only ones fit for us to imitate. In their opinions, the only proper employment of a free Citizen is, to be either incessantly assembled in the forum, or preparing for War .- Being valiant, inured to bardships, inflamed with an ardent love of one's Country, which is, after all, nothing more than an ardent defire of injuring all Mankind for the fake of that Society of which we are Members-and with an ardent love of glory, which is likewise nothing more than an ardent defire of committing flaughter, in order to make afterwards a boast of it, have appeared to these Writers to be the only focial qualificalifications worthy of our esteem, and of the encouragement of law-givers. And while, in order to support such opinions, they have used a profusion of exaggerated expressions without any distinct meaning, and perpetually repeated, though without defining them, the words dastardliness, corruption, greatness of soul, and virtue, they have never once thought of telling us the only thing that was worth our knowing, which is, whether men were happy under those Governments which they so much exhorted us to imitate.

Nor, while they thus misapprehend the only rational design of civil Societies, have they better understood the true end of the particular institutions by which they were to be regulated. They were satisfied when they saw the sew who really governed every thing in the State, at times perform the illusory ceremony of assembling the body of the People, that they might appear to consult them: and the mere giving of votes, under any disadvantage in the manner of giving them, and how much soever the law might afterwards be neglected that was thus pretended to

<sup>\*</sup> I have used all the above expressions in the same sense in which they were used in the ancient Common-wealths, and still are by most of the Writers who describe their Governments.

have been made in common, has appeared to them to be Liberty.

But those Writers are in the right: a Man who contributes by his vote to the paffing of a law, has himself made the law; in obeying it, he obeys himself,-he therefore is free. A play on words, and nothing more. The individual who has voted in a popular legislative Assembly, has not made the law that has passed in it; he has only contributed, or feemed to contribute, towards enacting it, for his thousandth, or even ten thousandth share: he has had no opportunity of making his objections to the proposed law, or of canvassing it, or of proposing restrictions to it, and he has only been allowed to express his affent or diffent. When a law is paffed agreeably to his vote, it is not as a consequence of this his vote, that his will happens to take place; it is because a number of other Men have accidentally thrown themselves on the same side with him: when a law contrary to his intentions is enacted, he must nevertheless submit to it.

This is not all; for though we should suppose that to give a vote is the effential constituent of liberty, yet, such liberty could only be said to last for a single moment, after which it becomes necessary to trust entirely to the discretion of other persons, that is, according to this doctrine, to be

no longer free. It becomes necessary, for inflance, for the Citizen who has given his vote, to rely on the honesty of those who collect the suffrages; and more than once have false declarations been made of them.

The Citizen must also trust to other persons for the execution of those things which have been resolved upon in common: and when the assembly shall have separated, and he shall find himself alone, in the presence of the Men who are invested with the public power, of the Consuls, for instance, or of the Dictator, he will have but little security for the continuance of his liberty, if he has only that of having contributed by his suffrage towards enacting a law which they are determined to neglect.

What then is Liberty? Liberty, I would answer, so far as it is possible for it to exist in a Society of Beings whose interests are almost perpetually opposed to each other, consist in this, that, every Man, while be respects the persons of others, and allows them quietly to enjoy the produce of their industry, be certain himself likewise to enjoy the produce of bis own industry, and that his person be also secure. But to contribute by one's suffrage to procure these advantages to the Community,—to have a share in establishing that order, that general arrangement of things, by

means

means of which an individual, lost as it were in the croud, is effectually protected,—to lay down the rules to be observed by those who, being invested with a considerable power, are charged with the desence of individuals, and provide that they should never transgress them,—these are functions, are acts of Government, but not constituent parts of Liberty.

To express the whole in two words: To concur by one's suffrage in enacting laws, is to enjoy a share, whatever it may be, of Power: to live in a state where the laws are equal for all, and sure to be executed (whatever may be the means by which these advantages are attained) is to be free.

Be it so; we grant that to give one's suffrage is not liberty itself, but only a means of procuring it, and a means too which may degenerate to mere form; we grant also, that it is possible that other expedients might be found for that purpose, and that, for a Man to decide that a State with whose Government and interior administration he is unacquainted, is a State in which the People are slaves, are nothing, merely because the Comitia of ancient Rome are no longer to be met with in it, it is a somewhat precipitate decision. But still we must continue to think, that liberty would be much more complete, if the People at

large were expressly called upon to give their opinion concerning the particular provisions by which it is to be secured, and that the English laws, for instance, if they were made by the suffrages of all, would be wifer, more equitable, and, above all, more likely to be executed. To this objection, which is certainly specious, I shall endeavour to give an answer.

If, in the first formation of a civil Society, the only care to be taken was that of establishing, once for all, the feveral duties which every individual owes to others, and to the State, -if those who are intrusted with the care of procuring the performance of these duties, had neither any ambition, nor any other private passions, which such employment might put in motion, and furnish the means of gratifying; in a word, if looking upon their function as a mere talk of duty, they were never tempted to deviate from the intentions of those who had appointed them; I confess that in such a case, there might be no inconvenience in allowing every individual to have a share in the government of the community of which he is a member; or rather I ought to fay, in fuch a Society, and among fuch Beings, there would be no occasion for any Government.

But experience teaches us that many more precautions, indeed, are necessary to oblige Men

to be just towards each other; nay, the very first expedients that may be expected to conduce to fuch an end, fupply the most fruitful source of the evils which are proposed to be prevented. Those laws which were intended to be equal for all, are foon warped to the private convenience of those who have been made the administrators of them :- instituted at first for the protection of all, they foon are made only to defend the usurpations of a few; and as the People continue to respect them, while those to whose guardianship they were intrusted make little account of them, they at length have no other effect than that of fupplying the want of real strength in those few who have contrived to place themselves at the head of the community, and of rendering regular and free from danger the tyranny of the fmaller number over the greater.

To remedy, therefore, evils which thus have a tendency to refult from the very nature of things,—to oblige those who are in a manner Masters of the law, to conform themselves to it,—to render ineffectual the silent, powerful, and ever active conspiracy of those who govern, requires a degree of knowledge, and a spirit of perfeverance, which are not to be expected from the multitude.

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The greater part of those who compose this multitude, taken up with the care of providing for their subsistence, have neither sufficient leisure, nor even, in consequence of their more imperfect education, the degree of information requifite for functions of this kind. Nature, belides, who is fparing of her gifts, has bestowed upon only a few Men an understanding capable of the complicated refearches of Legislation; and, as a fick Man trusts to his Physician, a Client to his Lawver. fo the greater number of the Citizens must trust to those who have more abilities than themfelves for the execution of things which, at the fame that they so materially concern them, require fo many qualifications to perform them with any degree of fufficiency.

To these considerations, of themselves so material, another must be added, which is if possible of still greater weight. This is, that the multitude, in consequence of their very being a multitude, are incapable of coming to any mature resolution.

Those who compose a popular Assembly are not actuated, in the course of their deliberations, by any clear and precise view of any present or positive personal interest. As they see themselves lost as it were in the crowd of those who are called upon to exercise the same function with themselves,—as they know that their individual votes

will make no change in the public resolution, and that, to whatever side they may incline, the general result will nevertheless be the same, they do not undertake to enquire how far the things proposed to them agree with the whole of the laws already in being, or with the present circumstances of the State, because Men will not enter upon a laborious task, when they know that it can scarcely answer any purpose.

It is, however, with dispositions of this kind, and each relying on all, that the Affembly of the People meets. But as very few among them have previously considered the subjects on which they are called upon to determine, very few carry along with them any opinion or inclination, or at least any inclination of their own, and to which they are refolved to adhere. As however it is necessary at last to come to some resolution, the major part of them are determined by reasons which they would blush to pay any regard to, on much less ferious occasions. An unusual fight, a change of the ordinary place of the Affembly, a fudden difturbance, a rumour, are, amidft the general want of a spirit of decision, the fufficiens ratio of the determination of the greatest part \*; and

<sup>\*</sup> Every one knows of how much importance it was in the Roman Commonwealth, to assemble the People, in one place rather

from this affemblage of separate wills, thus formed hastily and without reflection, a general will refults, which is also void of reflection.

If, amidst these disadvantages, the Assembly were lest to themselves, and no body had an interest to lead them into error, the evil, though very great, would not however be extreme, because such an affembly never being called upon but to determine upon an affirmative or negative, that is, that is never having, but two cases to choose between, there would be an equal chance for their choosing either; and it might be hoped that at every other turn they would take the right side.

But the combination of those who share either in the actual exercise of the public Power, or its advantages, do not thus allow themselves to sit down in inaction. They wake, while the People sleep. Entirely taken up with the thoughts of their own power, they live but to increase it. Deeply versed in the management of public business, they see at once all the possible consequences of measures. And as they have the exclusive direction of the springs of Government, they give rise, at their pleasure, to every incident that may

rather than another. In order to change entirely the nature of their resolutions, it was often sufficient to hide from them, or let them see, the Capitol.

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influence the minds of a multitude who are not on their guard, and who wait for some event or other that may finally determine them.

It is they who convene the Affembly, and diffolve it: it is they who offer propositions, and make speeches to it. Ever active in turning to their advantage every circumstance that happens, they equally avail themselves of the tractableness of the People during public calamities, and its heedlessness in times of prosperity. When things take a different turn from what they expected, they difmifs the Affembly. By prefenting to it many propositions at once, and which are to be voted upon in the lump, they hide what is destined to promote their own private views, or give a colour to it, by joining it with things which they know will take hold of the mind of the People . By prefenting in their speeches, arguments and facts, which Men have no time to ex-

<sup>\*</sup> It was thus the Senate, at Rome, assumed to itself the power of laying taxes. They promised, in the time of the war against the Veientes, to give pay to such Citizens as would inlist: and to that end they establish a tribute. The people, solely taken up with the idea of not going to war at their own expence, were transported with so much joy, that they crouded at the door of the Senate, and laying hold of the hands of the Senators, called them their Fathers—Nibil unquam acceptum à plebe tanto gaudio traditur: concursum itaque Curiam esse prebensatasque excuntium mauus, Patres yere appellates, &c. See Tit. Liv. book iv.

amine, they lead the People into gross, and yet decisive errors, and the common-places of rhetoric, supported by their personal influence, ever enable them to draw to their side the majority of votes.

On the other hand, the few (for there are, after all, fome) who, having meditated on the proposed question, see the consequences of the decifive step which is just going to be taken, being loft in the crowd, cannot make their feeble voices to be heard in the midst of the universal noise and They have it no more in their power to stop the general motion, than a Man in the midst of an army on a march, has it in his power to avoid marching. In the mean time, the People are giving their fuffrages; a majority appears in favour of the propofal; it is finally proclaimed as the general will of all; and it is at bottom nothing more than the effect of the artifices of a few defigning Men, who are exulting among themselves \*.

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\* I might confirm all these things by numberless instances from ancient History; but, if I may be allowed, in this case, to draw examples from my own Country, & celebrare domestica facta, I shall relate facts which will be no less to the purpose. In Geneva, in the year 1707, a law was enacted, that a General Assembly of the People should be held every sive years, to treat of the affairs of the Republic; but the Magistrates, who dreaded those Assem-

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In a word, those who are acquainted with Republican Governments, and, in general, who know the manner in which business is transacted in numerous Assemblies, will not scruple to affirm, that

blies, foon obtained from the Citizens themselves the repeal of the law: and the first resolution of the People, in the first of these periodical Assemblies (in the year 1712) was to abolish them for ever. The profound secrecy with which the Magistrates prepared their proposal to the Citizens on that Subject, and the Sudden manner in which the latter, when affembled, were acquainted with it, and made to give their votes upon it, have indeed accounted but imperfectly for this strange determination of the People ; and the confternation which feized the whole Affembly when the refult of the fuffrages was proclaimed, has confirmed many in the opinion that fome unfair means had been used. The whole transaction has been kept secret to this day; but the common opinion on this subject, which has been adopted by M. Rousseau in his Lettres de le Montagne, is this: the Magistrates, it is faid, had privately instructed the Secretaries in whose cars the Citizens were to whifter their fuffrages : when a Citizen faid, approbation, he was understood to approve the proposal of the Magistrates; when he said, rejection, he was understood to reject the periodial Assemblies.

In the year 1738, the Citizens enacted at once into laws a small Code of forty-four Articles, by one single line of which they bound themselves for ever to elect the sour Syndies (the Chiefs of the Council of the Twenty-sive) out of the Members of the same Council; whereas they were before free in their choice. They at that time suffered

that the few who are united together, who take an active part in public affairs, and whose station makes them conspicuous, have such an advantage over the many who turn their eyes towards them, and are without union among themselves, that even with a middling degree of skill, they can at all times direct, at their pleasure, the general resolutions;—that, as a consequence of the very nature of things, there is no proposal, however

also the word approved to be slipped into the law mentioned in the Note \* p. 185, which was transcribed from a former Code: the consequence of which was to render the Magistrates absolute masters of the Legislature.

The Citizens had thus been successively stripped of all their political rights, and had little more left to them than the pleasure of being called a Sovereign Assembly when they met (which idea, it must be confessed, preserved among them a spirit of resistance which it would have been dangerous for the Magistrates to provoke too far), and the power of at least refusing to elect the four Syndies. Upon this privilege the Citizens have, a few years ago, (A. 1765, to 1768.) made their last stand: and a fingular conjuction of circumstances having happened at the same time, to raise and preserve among them, Juring three years, an uncommon spirit of union and perseverance, they have in the iffue succeeded in a great measure to repair the injuries which they had been made to do to themselves, for these last two hundred years and more. (A total change has fince that time been effected by foreign forces, in the Government of the Republic (A. 1782) upon which this is not a proper place to make any observation.)

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abfurd, to which a numerous affembly of Men may not, at one time or other, be brought to affent;—and that laws would be wifer, and more likely to procure the advantage of all, if they were to be made by drawing lots, or cafting dice, than by the fuffrages of a multitude.

#### CHAP. VI.

Advantages that accrue to the People from appointing Representatives.

HOW then shall the People remedy the disadvantages that necessarily attend their situation? How shall they resist the phalanx of those who have engrossed to themselves all the honours, dignities, and power in the State.

It will be by employing for their defence the fame means by which their adversaries carry on their attacks: it will be by using the same weapons as they do, the same order, the same kind of discipline.

They are a small number, and consequently easily united;—a small number must therefore be opposed to them, that a like union may also be obtained. It is because they are a small number, that they can deliberate on every occurrence, and

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never come to any resolutions but such as are maturely weighed—it is because they are sew, that they can have forms which continually serve them for general standards to resort to, approved maxims to which they invariably adhere, and plans which they never lose sight of :—here therefore, I repeat it, oppose to them a small number, and you will obtain the like advantages.

Besides those who govern, as a farther consequence of their being few, have a more considerable share, consequently feel a deeper concern in the fuccess, whatever it may be, of their enterprizes. As they usually profess a contempt for their adversaries, and are at all times acting an offensive part against them, they impose on themfelves an obligation of conquering. They, in short, who are all alive from the most powerful incentives, and aim at gaining new advantages, have to do with a multitude, who, wanting only to preferve what they already possess, are unavoidably liable to long intervals of inactivity and supineness. But the People, by appointing Representatives, immediately gain to their cause that advantageous activity which they before stood in need of, to put them on a par with their adversaries; and those paffions become excited in their defenders by which they themselves cannot possible be actuated.

Exclusively charged with the care of public liberty, the Representatives of the People will be animated by a sense of the greatness of the concerns with which they are intrusted. Distinguished from the bulk of the Nation, and forming among themselves a separate Assembly, they will affert the rights of which they have been made the Guardians, with all that warmth which the esprit de corps is used to inspire. Placed on an elevated theatre, they will endeavour to render themselves still more conspicuous; and the arts and ambitious activity of those who govern, will now be encountered by the vivacity and perseverance of opponents actuated by the love of glory.

Lastly, as the Representatives of the People will naturally be selected from among those Citizens who are most favoured by fortune, and will have consequently much to preserve, they will, even in the midst of quiet times, keep a watchful eye on the motions of Power. As the advantages they possess, will naturally create a kind of rivalship between them and those who govern, the jealousy which they will conceive

<sup>\*</sup> If it had not been for an incentive of this kind, the English Commons would not have vindicated their right of taxation with so much vigilance as they have done, against all enterprizes, often perhaps involuntary, of the Lords.

against the latter, will give them an exquisite degree of sensibility on every increase of their authority. Like those delicate instruments which discover the operations of Nature, while they are yet imperceptible to our senses, they will warn the People of those things which of themselves they never see but when it is too late; and their greater proportional share, whether of real riches, or of those which lie in the opinions of Men, will make them, if I may so express mysels, the barometers that will discover, in its first beginning, every tendency to a change in the Constitution.

#### CHAP. VII.

The Subject continued—The Advantages that accrue to the People from their appointing Representatives, are very inconsiderable, unless they also entirely trust their Legislative Authority to them.

THE observations made in the preceding Chapter are so obvious, that the People themselves, in popular Governments, have always been

\* All the above reasoning effentially requires that the Representatives of the People should be united in interest with the People. We shall soon see that this union really obtains in the English Constitution, and may be called the masterpiece of it.

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fensible of the truth of them, and never thought it possible to remedy, by themselves alone, the disadvantages necessarily attending their situation. Whenever the oppressions of their Rulers have forced them to resort to some uncommon exertion of their legal powers, they have immediately put themselves under the direction of those sew Men who had been instrumental in informing and encouraging them; and when the nature of the circumstances has requiring any degree of sirmness and perseverance in their conduct, they have never been able to attain the ends they proposed to themselves, except by means of the most implicit deserence to those Leaders whom they had thus appointed.

But as these Leaders, thus hastily chosen, are easily intimidated by the continual display which is made before them of the terrors of Power, as that unlimited considence which the People now repose in them, only takes place when public liberty is in the utmost danger, and cannot be kept up otherwise than by an extraordinary conjunction of circumstances, and in which those who govern feldom suffer themselves to be caught more than once, the People have constantly sought to avail themselves of the short intervals of superiority which the chance of events had given them, for rendering durable those advantages which they knew

knew would, of themselves, be but transitory, and for getting some persons appointed, whose peculiar office it may be to protect them, and whom the Constitution shall thencesorwards recognize. Thus it was that the People of Lancedæmon obtained their Ephori, and the People of Rome their Tribunes.

We grant this, will it be faid; but the Roman People never allowed the Tribunes to conclude any thing definitively; they, on the contrary, referved to themselves the right of ratifying any resolutions the latter should take. This, I anfwer, was the very circumstance that rendered the institution of Tribunes totally ineffectual in the event. The People thus wanting to interfere with their own opinions, in the refolutions of those on whom they had, in their wisdom, determined entirely to rely, and endeavouring to fettle with an hundred thousad votes, things which would have been fettled equally well by the votes of their advisers, defeated in the iffue every beneficial end of their former provisions; and while they meant to preserve an appearance of their fovereignty (a chimerical appearance, fince it was under the direction of others that they intended to vote), they fell back into all those inconveniences which we have before mentioned.

<sup>.</sup> See Rousseau's Social Contract.

The Senators, the Confuls, the Dictators, and the other great Men in the Republic, whom the People were prudent enough to fear, and fimple enough to believe, continued still to mix with them, and play off their political artifices. They continued to make speeches to them \*, and still availed themselves of their privilege of changing at their pleasure the place and form of the public meetings. When they did not find it possible by fuch means to direct the resolutions of the Assemblies, they pretended that the omens were not favourable, and under this pretext, or others of the fame kind, they diffolved them †. And the Tri-

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· Valerius Maximus relates that the Tribunes of the People having offered to propose some regulations in regard to the price of corn, in a time of great scarcity, Scipio Nasica over-ruled the Affembly merely by faying, "Silence, Romans;

" I know better than you what is expedient for the Repub-

er lic. Which words were no fooner heard by the People,

" than they shewed by a silence full of veneration, that they

" were more affected by his authority, than by the neces-

" fity of providing for their own subsistence." Tacete, qua-So, Quirites. Plus enim ego quam vos quid reipublicæ expediat Quá voce auditá, omnes, pleno venerationis filentio, majorem ejus autoritatis quam alimentorum suorum curam egerunt.

+ Quid enim majus est, si de jure Augurum quærimus, says Tully, who himself was an Augur, and a Senator into the bargan, quam poffe a summis imperiis & summis potestatibus Comitatus & Concilia, vel instituta dimittere, vel babita rescin-

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bunes, when they had fucceeded fo far as to effect an union among themselves, thus were obligated to submit to the pungent mortification of seeing those projects which they had pursued with infinite labour, and even through the greatest dangers, irrecoverably deseated by the most despicable artifices.

When, at other times, they faw that a confederacy was carrying on with uncommon warmth against them, and despaired of succeeding by employing expedients of the above kind, or were afraid of diminishing their efficacy by a too frequent use of them, they betook themselves to other stratagems. They then conferred on the Confuls, by the means of a short form of words for the occasion \*, an absolute power over the lives of the Citizens, or even appointed a Dictator. The People, at the fight of the State masquerade which was displayed before them, were fure to fink into a state of consternation; and the Tribunes, however clearly they might fee through the artifice, also trembled in their turn, when they thus beheld themselves left without defenders +.

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dere! Quid gravius, quam rem susceptam dirimi, si unus Augur ALIAM (id est, alium diem) dixerit! See De Legib. lib. ii. § 12.

<sup>\*</sup> Videat Consul ne quid detrimenti Respublica capiat.

<sup>+ &</sup>quot; The Tribunes of the People," fays Livy, who was a

At other times, they brought false accusations against the Tribunes before the Assembly itself; or by privately flandering them with the People, they totally deprived them of their confidence. It was through artifices of this kind, that the People were brought to behold, without concern, the murder of Tiberius Gracchus, the only Roman that was really virtuous—the only one who truly loved the People. It was also in the same manner that Caius, who was not deterred by his brother's fate from pursuing the same plan of conduct, was in the end so entirely forsaken by the People, that nobody could be found among them who would even lend him a horse to fly from the fury of the Nobles; and he was at last compelled to lay violent hands upon himself, while he invoked the wrath of the Gods on his inconstant fellow-citizens.

At other times, they raised divisions among the People. Formidable combinations broke out, on a sudden, on the eve of important transactions; and all moderate Men avoided attending

great admirer of the Aristocratical power, " and the People" themselves, durst neither lift up their eyes, nor even mut" ter, in the presence of the Dictator." Nic adversus Dictatoriam vim, aut Tribuni plebis aut ipsa Plebs, attollere oculos, aut biscere, audebant——See Tit. Liv. lib. vi. § 16.

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Affemblies, where they faw that all was to be turnult and confusion.

In fine, that nothing might be wanting to the insolence with which they treated the Assemblies of the People, they sometimes falsified the declarations of the number of the votes; they even once went so far as to carry off the urns into which the Citizens were to throw their suffrages.

## CHAP. VIII.

The Subject concluded.—Effects that have refulted in the English Government, from the People's Power being completely delegated to their Representatives.

BUT when the People have entirely trusted their power to a moderate number of persons, affairs immediately take a widely different turn. Those who govern are from that

The reader with respect to all the above observations, may see Plutarch's Lines, particularly the Lives of the two Gracchi. I must add, that I have avoided drawing any instance from those Assemblies in which one half of the People were made to arm themselves against the other. I have here only alluded to those times which immediately either preceded or followed the third Punic war, that is, of those which are commonly called the best period of the Republic.

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moment obliged to leave off all those stratagems which had hitherto enfured their fuccefs. Instead of those Assemblies which they affected to despise, and were perpetually comparing to ftorms, or to the current of the Euripus , and in regard to which they accordingly thought themselves at liberty to pass over the rules of Justice, they now find that they have to deal with Men who are their equals in point of education and knowledge, and their inferiors only in point of rank and form. They, in confequence, foon find it necessary to adopt quite different methods; and, above all, become very careful not to talk to them any more about the facred chickens, the white or black days, and the Sibylline books .- As they fee their new adversaries expect to have a proper regard paid to them, that fingle circumstance inspires them with it :- as they fee them act in a regular manner, observe constant rules, in a word proceed with form, they come to look upon them with respect, from the very same reason

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Tully makes no end of his fimiles on this subject. Quod enim fretum, quem Euripum, tot motus, tantas & tàm warias habere putatis agitationes sluctum, quantas perturbationes & quantos æstus babet ratio Comitiorum? See Orat. pro-Murænâ.—Concio, says he in another place, quæ ex impere-tissimis constat, & c. De Amicitia, § 25.

which makes them themselves to be reverenced by the People.

The Representatives of the People, on the other hand, do not fail foon to procure for themselves every advantage that may enable them effectually to use the powers with which they have been entrusted, and to adopt every rule of proceeding that may make their refolutions to be truly the refult of reflection and deliberations. Thus it was that the Representatives of the English Nation, soon after their first establishment, became formed into a separate Affembly: they afterwards obtained the liberty of appointing a President :- soon after, they infifted upon their being confulted on the last form of the Acts to which they had given rife:-laftly, they infifted on thenceforth framing them themseves.

In order to prevent any possibility of surprize in the course of their poceedings, it is a settled rule with them, that every proposition, or bill, must be read three times, at different prefixed days, before it can receive a final sanction: and before each reading of the bill, as well as at its first introduction, an express resolution must be taken to continue it under consideration. If the bill be rejected, in any one of those several

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operations, it must be dropped, and cannot be proposed again during the same Session.

The Commons have been, above all, jealous of the freedom of speech in their Assembly. They have expressly stipulated, as we have above mentioned, that none of their words or speeches should be questioned in any place out of their House. In fine, in order to keep their deliberations free from every kind of instuence, they have denied their President the right to give his vote, or even his opinion:—they moreover have settled it as a rule, not only that the King could not send to them any express proposal about laws, or other subjects, but even that his name should never be mentioned in the deliberations.

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<sup>•</sup> It is moreover a fettled rule in the House of Commons, that no Member is to speak more than once in the same day. When the number and nature of the clauses of a Bill require that it should be discussed in a freer manner, a Committee is appointed for the purpose, who are to make their report asterwards to the House. When the subject is of importance, this Committee is formed of the whole House, which still continues to sit in the same place, but in a less solemn manner, and under another President, who is called the Chairman of the Committee. In order to form the House again, the mace is replaced on the Table, and the Speaker goes again into his chair.

<sup>†</sup> If any person were to mention in his speech, what the King

But that circumstance which, of all others, constitutes the superior excellence of a Government in which the People act only through their Representatives, that is, by means of an affembly formed of a moderate number of persons, and in which it is possible for every Member to propose new subjects, and to argue and to canvass the questions that arise, is that such a Constitution is the only one that is capable of the immense advantage, and of which I do not know if I have been able to convey an adequate idea to the reader when I mentioned it before \*, I mean that of putting into the hands of the People the moving springs of the Legislative authority.

In a Constitution where the People at large exercise the function of enacting the Laws, as it is only to those persons towards whom the Citizens are accustomed to turn their eyes, that is to the very Men who govern, that the Assembly have either time or inclination to listen, they acquire, at length, as has constantly been the case in all Republics, the exclusive right of proposing, if they please, when they please, in what manner they please. A prerogative this, of such extent,

King wishes should be, would be glad to see, &c. he would be immediately called to order, for attempting to influence the debate.

<sup>\*</sup> See chap. iv. of this Book,

that it would fuffice to put an affembly formed of Men of the greatest parts, at the mercy of a few dunces, and renders completely illusory the boast-ed power of the People. Nay more, as this pre-rogative is thus placed in the very hands of the adversaries of the People, it forces the People to remain exposed to their attacks, in a condition perpetually passive, and takes from them the only legal means by which they might effectually oppose their usurpations,

To express the whole in a few words. A representative Constitution places the remedy in the
hands of those who feel the disorder: but a popular Constitution places the remedy in the hands
of those who cause it: and it is necessarily productive, in the event, of the missortune—of the
political calamity, of trusting the care and the
means of repressing the invasions of power, to the
Men who have the enjoyment of power,

#### CHAP. IX.

A farther Disadvantage of Republican Governments.

—The People are necessarily betrayed by those in whom they trust.

HOWEVER, those general assemblies of a People who were made to determine upon things which they neither understood nor examined,—that general confusion in which the Ambitious could at all times hide their artifices, and carry on their schemes with safety, were not the only evils attending the ancient Commonwealths. There was a more secret defect, and a defect that struck immediately at the very vitals of it, inherent in that kind of Government.

It was impossible for the People ever to have faithful desenders. Neither those whom they had expressly chosen, nor those whom some personal advantages enabled to govern the Assemblies (for the only use, I must repeat it, which the People ever make of their power, is either to give it away, or allow it to be taken from them) could possibly be united to them by any common feeling of the same concerns. As their influence put them, in a great measure, upon a level with those who were invested with the executive authority, they

cared little to restrain oppressions out of the reach of which they saw themselves placed. Nay, they seared they should thereby lessen a power which they knew was one day to be their own; if they had not even already an actual share in it \*.

Thus, at Rome, the only end which the Tribunes ever purfued with any degree of fincerity and perseverance, was to procure to the People, that is to themselves, an admission to all the different dignities in the Republic. After having obtained that a law should be enacted for admitting Plebeians to the Confulship, they procured for them the liberty of intermarrying with the Patricians. They afterwards rendered them admissible to the Dictatorship, to the office of military Tribune, to the Cenforship: in a word, the only use they made of the power of the People, was to increase privileges which they called the privileges of all, though they and their friends alone were ever likely to have the enjoyment of them.

<sup>\*</sup> How could it be expected that Men who entertained views of being Prætors, would endeavour to restrain the power of the Prætors,—that Men who aimed at being one day Consuls, would wish to limit the power of the Consuls,—that Men whom their influence among the People made sure of gettting into the Senate, would seriously endeavour to consine the authority of the Senate?

But we do not find that they ever employed the power of the People in things really beneficial to the People. We do not find that they ever fet bounds to the terrible power of its Magistrates, that they ever repressed that class of Citizens who knew how to make their crimes pass uncensured;—in a word, that they ever endeavoured, on the one hand to regulate, and on the other to strengthen, the judicial power; precautions these, without which men might struggle to the end of time, and never attain true liberty.

And indeed the judicial power, that fure criterion of the goodness of a Government, was always, at Rome, a mere instrument of tyranny. The Consuls were at all times invested with an absolute power over the lives of the Citizens. The Dictators possessed the same right; so did the Prætors, the Tribunes of the People, the judicial Commissioners named by the Senate, and so, of course, did the Senane itself; and the fact of the three hundred and seventy deserters whom it commanded to be thrown down at one time, as Livy relates, from the Tarpeian rock,

<sup>\*</sup> Without fuch precautions, laws must always be, as Popo expresses it,

<sup>&</sup>quot;Still for the firong too weak, the weak too firong."

fufficiently shews that it well knew how to exert its power upon occasion.

It even may be faid, that, at Rome, the power of life and death, or rather the right of killing, was annexed to every kind of authority whatever, even to that which refults from mere influence, or wealth; and the only confequence of the murder of the Gracchi, which was accompanied by the flaughter of three hundred. and afterwards of four thousand unarmed Citizens, whom the Nobles knocked on the head, was to engage the Senate to erect a Temple to Concord. The Lex Porcia de tergo civium, which has been fo much celebrated, was attended with no other effect but that of more completely fecuring against the danger of a retaliation, such Confuls, Prætors, Quæftors, &c. as, like Verres, caused the inferior Citizens of Rome to be scourged with rods, and put to death upon crosses, through mere caprice and cruelty .

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<sup>\*</sup> If we turn our eyes to Lacedamon, we shall see, from several instances of the justice of the Ephori, that matters were little better ordered there, in regard to the administration of public justice. And in Athens itself, which is the only one of the ancient Commonwealths of which the People seem to have enjoyed any degree of real liberty, we see the Magistrates proceed nearly in the same manner as they now do among the Turks; and I think no other proof needs to be given

In fine, nothing can more completely shew to what degree the Tribunes had for saken the interests of the People, whom they were appointed to defend, than the fact of their having allowed the Senate to invest itself with the power of taxation: they even suffered it to assume to itself the power, not only of dispensing with the laws, but also of abrogating them \*.

In a word, as the necessary consequence of the

given than the story of that Barber in the Piræus, who having spread about the Town the news of the overthrow of the Athenians in Sicily, which he had heard from a stranger who had stopped at his shop, was put to the torture, by the command of the Archons, because he could not tell the name of his author.—See Plut. Life of Nicias.

There are frequent instances of the Consuls taking away from the Capitol the tables of the laws passed under their predecessors. Nor was this, as we might at first be tempted to believe, an act of violence which success alone could justify; it was a consequence of the acknowledged power enjoyed by the Senate cujus erat gravissimum judicium de jure legum, as we may see in several places in Tully. Nay, the Augurs themselves, as Tully informs us, enjoyed the same privilege. If laws have not been laid before the people, in the legal form, they (the Augurs) may set them aside: as was done with respect to the Lex Tatia, by the decree of the College, and to the Leges Livia, by the advice of Philip, who was Consul and Augur. Legem si non jure rogata est, tollere possunt; ut Tatiam, decreto Collegii, ut Livius, consilio Philippi, Consulis & Auguris—See De Legib. lib. ii. § 12.

communicability of power, a circumstance efferitially inherent in the republican form of government, it is impossible for it ever to be restrained within certain rules. Those who are in a condition to controul it, from that very circumstance, become its defenders. Though they may have rifen, as we may suppose, from the humblest stations, and fuch as feemed totally to preclude them from all ambitious views, they have no fooner reached a certain degree of eminence, than they begin to aim higher. Their endeavours had at first no other object, as they professed, and perhaps with fincerity, than to fee the laws impartially executed: their only view now is to fet themselves above them; and seeing themfelves raifed to the level of a class of Men who possess all the power, and enjoy all the advantages in the State, they make hafte to affociate themfelves with them \*.

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\* Which always proves an easy thing. It is in Commonwealths the particular care of that class of Men who are at the head of the State, to keep a watchful eye over the People, in order to draw over to their own party any Man who happens to acquire a considerable influence among them; and this they are (and indeed must be) the more attentive to do, in proportion as the nature of the Government is more democratical.

The Constitution of Rome had even made express provisions on that subject. Not only the Censors could at Personal power and independence on the laws being, in such States, the immediate consequence of the favour of the people, they are under an unavoidable necessity of being betrayed. Corrupting, as it were, every thing they touch, they cannot shew a preference to a Man, but they thereby attack his virtue; they cannot raise him, without immediately losing him and weakening their own cause; nay, they inspire him with views directly opposite to their own, and fend him to join and increase the number of their enemies.

Thus, at Rome, after the feeble barrier which excluded the People from offices of power and dignity had been thrown down, the great Plebeians, whom the votes of the People began to raife to those offices, were immediately received into the Senate, as has been just now observed. From that period, their families began to form, in conjunction with the ancient Patrician families, a new combination or political affociation of per-

once remove any Citizen into what Tribe they pleased, and even into the Senate, and we may easily believe that they made a political use of this privilege; but it was moreover a settled rule, that all Persons who had been promoted to any public office by the People, such as the Consulship, the Edileship, or Tribuneship, became ipso facto, members of the Senate.—See Middleton's Differtation on the Roman Senate.

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fons •; and as this combination was formed of no particular class of Citizens, but of all those in general who had influence enough to gain admittance into it, a fingle overgrown head was now to be seen in the Republic, which consisting of all those who had either wealth or power of any kind, and disposing at will of the laws and power of the People †, soon lost all regard to moderation and decency.

Every Constitution, therefore, whatever may be its form, which does not provide for inconveniencies of the kind here mentioned, is a Constitution essentially imperfect. It is in Man himfelf that the source of the evils to be remedied, lies; general precautions therefore can alone prevent them. If it be a fatal error entirely to rely on the justice and equity of those who govern, it is an error no less dangerous to imagine, that, while virtue and moderation are the constant companions of those who oppose the abuses of Power, all ambition, all thirst after dominion, have retired to the other party.

<sup>\*</sup> Called Nobiles and Nobilitas.

<sup>†</sup> It was in feveral respects, a missortune for the People of Rome, whatever may have been said to the contrary by the Writers on this subject, that the distinction between the Patricians and the Plebeians was ever abolished; though, to say the truth, this was an event which could not be prevented.

Though wife Men fometimes may, led aftray by the power of names, and the heat of political contentions, lose fight of what ought to be their real aim, they nevertheless know that it is not against the Appii, the Coruncanii, the Cethegi, but against all those who can influence the execution of the laws, that precautions ought to be taken,that it is not the Conful, the Prætor, the Archon. the Minister, the King, whom we ought to dread, nor the Tribune, or the Representative of the People, on whom we ought implicitly to rely: but that all those persons, without distinction, ought to be the objects of our jealoufy, who by any methods, and under any names whatfoever, have acquired the means of turning against each individual the collective strength of all, and have fo ordered things around themselves, that whoever attempts to refift them, is fure to find himself engaged alone against a thousand;

who have the Parliament can effective as nume--thousand and a missing of an experimental a metalestate applier Power domes forward, which salves the abilities correspond of it, which this all the supply in its receipt its adoption of its eleption The Publication may by new mater. but indiredistribution fower ferres apon the croduct

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### CHAP. X.

Fundamental difference between the English Government, and the Governments just described.—In England all Executive Authority is placed out of the bands of those in whom the People trust. Usefulness of the Power of the Crown.

IN what manner then, has the English Constitution contrived to find a remedy for evils which, from the very nature of Men and things, seem to be irremediable? How has it found means to oblige those persons to whom the People have given up their power, to make them effectual and lasting returns of gratitude? those who enjoy an exclusive authority, to seek the advantage of all?—those who make the laws, to make only equitable ones? It has been by subjecting themselves to those laws, and for that purpose excluding them from all share in the execution of them.

Thus, the Parliament can establish as numerous a standing army as it pleases; but immediately another Power comes forward, which takes the absolute command of it, which fills all the posts in it, and directs its motions at its pleasure. The Parliament may lay new taxes; but immediately another power seizes upon the produce of them, and alone enjoys the advantages and glory arising from the disposal of it. The Parliament

may even, if you please, repeal the laws on which the safety of the Subject is grounded; but it is not their own caprices and arbitrary humours, it is the caprice and passions of other Men, which they will have gratified, when they shall thus have overthrown the columns of public liberty.

And the English Constitution has not only excluded from any share in the Execution of the laws, those in whom the people trust for the enacting them, but it has also taken from them what would have had the same pernicious influence on their deliberations—the hope of ever invading that executive authority, and transferring it to themselves.

This authority has been made in England one fingle, indivisible prerogative; it has been made for ever the unalienable attribute of one person, marked out and ascertained before-hand by solemn laws and long established custom; and all the active forces in the State have been left at his disposal.

In order to fecure this prerogative still farther against all possibility of invasions from individuals, it has been heightened and strengthened by every thing that can attract and fix the attention and reverence of the people. The power of conferring, and withdrawing, places and employments has also been added to it, and ambition it-felf has thus been interested in its defence, and fervice.

A share in the Legislative power has also been given to the Man to whom this prerogative has been delegated: a passive share indeed, and the only one that can, with safety to the State, be trusted to him, but by means of which he is enabled to deseat every attempt against his constitutional authority.

Laftly, he is the only felf-exifting and permanent Power in the State. The Generals, the Ministers of State, are so only by the continuance of his pleasure. He would even difmiss the Parliament themselves, if ever he saw them begin to entertain dangerous designs; and he need only say one word to disperse every power in the State that may threaten his authority. Formidable prerogatives these; but with regard to which we shall be inclined to lay aside our apprehensions, if we resect, on the one hand, on the great privileges of the People by which they have been counter-balanced, and on the other, on the happy consequences that result from their being thus united together.

From this unity, and, if I may so express myfelf, this total sequestration of the Executive authority, this advantageous consequence in the first place sollows, which has been mentioned in a preceding Chapter, that the attention of the whole Nation is directed to one and the same object. The people, besides, enjoy this most es-

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fential advantage, which they would vainly endeavour to obtain under the government of many,—they can give their confidence, without giving power over themselves, and against themselves; they can appoint Trustees, and yet not give themselves Masters.

Those Men to whom the People have delegated the power of framing the Laws, are thereby made sure to seel the whole pressure of them. They can increase the prerogatives of the executive authority, but they cannot invest themselves with it:—they have it not in their power to command its motions, they only can unbind its hands.

They are made to derive their importance, nay, they are indebted for their existence, to the need in which that Power stands of their assistance; and they know that they would no sooner have abused the trust of the People, and completed the treacherous work, than they would see themselves dissolved, spurned, like instruments now spent, and become useless.

This fame disposition of things also prevents in England, that effential defect, inherent in the Government of many, which has been described in the preceding Chapter.

In that fort of Government, the cause of the People, as has been observed, is continually deserted and betrayed. The arbitrary prerogatives of

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the governing Powers are at all times either openly or fecretly favoured, not only by those in whose possession they are, not only by those who have good reason to hope that they shall at fome future time share in the exercise of them. but also by the whole crowd of those Men who, in consequence of the natural disposition of Mankind to overrate their own advantages, fondly imagine, either that they shall one day enjoy fome branch of this governing authority, or that they are even already, in fome way or other, affociated to it.

But as this authority has been made, in England, the indivisible, unalienable attribute of one alone, all other persons in the State are ipso facto, interested to confine it within its due bounds. Liberty is thus made the common cause of all: the laws that fecure it are supported by Men of every rank and order; and the Habeas Corpus Act, for instance, is as zealously defended by the first Nobleman in the Kingdom, as by the meanest Subject.

Even the Minister himself, in consequence of this inalienability of the executive authority, is equally interested with his fellow-citizens to maintain the laws on which public liberty is founded. He knows, in the midst of his schemes for enjoying or retaining his authority, that a Court-intrigue, or a caprice may at every instant confound him

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with the multitude, and the rancour of a fucceffor long kept out, fend him to linger in the fame jail which his temporary passions might tempt him to prepare for others.

In consequence of this disposition of things, great Men, therefore are made to join in a common cause with the People, for restraining the excesses of the governing Power; and, which is no less essential to the public welfare, they are also, from this same cause, compelled to restrain the excess of their own private power and influence, and a general spirit of justice becomes thus disfused through all parts of the State.

The wealthy Commoner, the Representative of the People, the potent Peer, always having before their eyes the view of a formidable Power, of a Power from the attempts of which they have only the shield of the laws to protect them, and which would, in the iffue, retaliate an hundred fold upon them their acts of violence, are compelled, both to wish only for equitable laws, and to observe them with scrupulous exactness.

Let then the People dread (it is necessary to the preservation of their liberty), but let them never entirely cease to love, the Throne, that sole and indivisible seat of all the active powers in the State,

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Let them know, it is that, which, by lending an immense strength to the arm of Justice, has enabled her to bring to account as well the most powerful, as the meanest offender,—which has suppressed, and if I may so express myself, weeded out all those tyrannies, sometimes consederated with, and sometimes adverse to, each other, which incessantly tend to grow up in the middle of civil societies, and are the more terrible in proportion as they seel themselves to be less firmly established.

Let them know, it is that, which, by making all honours and places depend on the will of one Man, has confined within private walls those projects the pursuit of which, in former times, shook the foundations of whole States,—has changed into intrigues the conflicts, the outrages of ambition,—and that those contentions which, in the present times, afford them only matter of amusement, are the Volcanos which set in slames the ancient Commonwealths.

It is that, which, leaving to the rich no other fecurity for his palace than that which the peafant has for his cottage, has united his cause to that of this latter, the cause of the powerful to that of the helpless, the cause of the Man of extensive influence and connections, to that of him who is without friends.

It is the Throne above all, it is this jealous Power, which makes the People fure that its Representatives never will be any thing more than its Representatives: at the same time it is the ever-subsisting Carthage which vouches to it for the duration of their virtue.

## CHAP. XI.

The Powers which the People themselves exercise.—
The Election of Members of Parliament.

THE English Constitution having essentially connected the fate of the Men to whom the People trust their power, with that of the People themselves, really seems, by that caution alone, to have procured the latter a complete security.

However, as the viciffitude of human affairs may, in process of time, realize events which at first had appeared most improbable, it might happen that the Ministers of the Executive power, notwithstanding the interest they themfelves have in the preservation of public liberty, and in spite of the precautions expressly taken in order to prevent the effect of their influence, should, at length, employ such efficacious means of corruption as might bring about a surrender

of some of the laws upon which this public liberty is sounded. And though we should suppose that such a danger would really be chimerical, it might at least happen, that conniving at a vicious administration, and being over liberal of the produce of the labours of the People, the Representatives of the People might make them suffer many of the evils which attend worse forms of Government.

Lastly, as their duty does not consist only in preserving their constituents against the calamities of an arbitrary Government, but moreover in procuring them the best administration possible, it might happen that they would manifest, in this respect, an indifference which would, in its consequences, amount to a real calamity.

It was therefore necessary that the Constitution should furnish a remedy for all the above cases; now, it is in the right of electing Members of Parliament, that this remedy lies.

When the time is come at which the commiffion which the People had given to their delegates expires, they again affemble in their feveral Towns or Counties: on these occasions they have it in their power to elect again those of their Representatives whose former conduct they approve, and to reject those who have contributed to give rise to their complaints. A simple remedy remedy this, and which only requiring, in its application, a knowledge of matters of fact, is entirely within the reach of the abilities of the People; but a remedy, at the fame time, which is the most effectual that could be applied; for, as the evils complained of, arise merely from the peculiar dispositions of a certain number of individuals, to fet aside those individuals, is to pluck up evil by the roots.

But I perceive, that in order to make the reader fensible of the advantages that may accrue to the People of England, from their right of election, there is another of their rights, of which it is absolutely necessary that I should first give an account,

# CHAP. XII.

The Subject continued.—Liberty of the Press.

AS the evils that may be complained of in a State, do not always arise merely from the defect of the laws, but also from the non-execution of them, and this non-execution of fuch a kind, that it is often impossible to subject it to any express punishment, or even to ascertain it by any previous definition, Men, in feveral States, have been led to feek for an expedient

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that might supply the unavoidable deficiency of legislative provisions, and begin to operate, as it were, from the point at which the latter began to fail: I mean here to speak of the Censorial power; a power which may produce excellent effects, but the exercise of which (contrary to that of the legislative power) must be left to the People themselves.

As the proposed end of Legislation is not, according to what has been above observed, to have the particular intentions of individuals, upon every case, known and complied with, but solely to have what is most conducive to the public good on the occasions that arise, found out, and established, it is not an effential requisite in legislative operations, that every individual should be called upon to deliver his opinion; and fince this expedient, which at first fight appears so natural, of feeking out by the advice of all that which concerns all, is found liable, when carried into practice, to the greatest inconveniences, we must not hefitate to lay it aside entirely. But as it is the opinion of individuals alone which constitute the check of a censorial power, this power cannot possibly produce its intended effect any farther than this public opinion is made known and declared: the fentiments of the People are the only thing in question here: therefore it is neces-

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oth a p fary that the People should speak for themselves, and manifest those sentiments. A particular Court of Censure therefore essentially frustrates its intended purpose: it is attended, besides, with very great inconveniences.

As the use of such a Court is to determine upon those cases which lie out of the reach of the laws, it cannot be tied down to any precise regulations. As a farther consequence of the arbitrary nature of its functions, it cannot even be fubjected to any conftitutional check: and it continually prefents to the eye the view of a power entirely arbitrary, and which in its different exertions may affect, in the most cruel manner, the peace and happiness of individuals. It is attended, befides with this very pernicious confequence, that, by dictating to the people their judgments of Men or measures, it takes from them that freedom of thinking, which is the noblest privilege, as well as the firmest support of Liberty \*.

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\* M. de Montesquieu, and M. Rousseau, and indeed all the Writers on this subject I have met with, bestow vast encomiums on the Censorial Tribunal that had been instituted at Rome;—they have not been aware that this power of censure, lodged in the hands of peculiar Magistrates, with other discretionary powers annexed to it, was no other than a piece of state-craft, like those described in the preceding Chap-

We may therefore look upon it as a farther proof of the fondness of the principles on which the English constitution is founded, that it has allotted to the People themselves the province of openly canvaffing and arraigning the conduct of those who are invested with any branch of public authority; and that it has thus delivered into the hands of the People at large, the exercise of the cenforial power. Every fubject in England has not only a right to present petitions to the king, or to the Houses of Parliament, but he has a right also to lay his complaints and observations before the Public, by means of an open press. A formidable right this, to those who rule mankind; and which, continually dispelling the cloud of majesty by which they are surrounded, brings

Chapters, and had been contrived by the Senate as an additional means of securing its authority. Sir Thomas More has also adopted similar opinions on the subject: and he is so far from allowing the people to canvass the actions of their Rulers, that in his System of Policy, which he calls An Account of Utopia (the happy Region, so and romos) he makes it death for individuals to talk about the conduct of Government.

I feel a kind of pleasure, I must confess, to observe on this occasion, that though I have been called by some an advocate for Power, I have carried my ideas of Liberty farther than many Writers who have mentioned that word with much enthusiasm.

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them to a level with the rest of the people, and strikes at the very being of their authority.

And indeed this privilege is that which has, been obtained by the English Nation with the greatest difficulty, and latest in point of time, at the expence of the Executive power. Freedom was in every other respect already established. when the English were still, with regard to the public expression of their fentiments, under restraints that may be called despotic. History abounds with instances of the severity of the Court of Star-Chamber, against those who prefumed to write on political fubjects. It had fixed the number of printers and printing-preffes, and appointed a Licenser, without whose approbation no book could be published. Besides, as this Tribunal decided matters by its own fingle authority, without the intervention of a Jury, it was always ready to find those persons guilty, whom the Court was pleafed to look upon as fuch; nor was it indeed without ground that Chief Justice Coke, whose notions of liberty were fomewhat tainted with the prejudices of the times in which he lived, concluded the eulogiums he has bestowed on this Court, with faying, that, " the right institution and orders " thereof being observed, it doth keep all Eng-" land in quiet,"

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After the Court of Star-Chamber had been abolished, the Long Parliament, whose conduct and affumed power were little better qualified to bear a fcrutiny, revived the regulations against the freedom of the press. Charles the Second, and after him James the Second, procured farther renewals of them. These latter acts having expired in the year 1692, were at this æra, although posterior to the Revolution, continued for two years longer; so that it was not till the year 1694, that, in consequence of the Parliament's refusal to continue the prohibitions any longer, the freedom of the press (a privilege which the Executive power could not, it feemed, prevail upon itself to yield up to the people) was finally established.

In what does then this liberty of the press precifely confift? It is a liberty left to every one to publish any thing that comes into his head? To calumniate, to blacken, whomfoever he pleafes? No; the fame laws that protect the person and the property of the individual, do also protect his reputation; and they decree against libels, when really fo, punishments of much the same kind as are established in other Countries. But, on the other hand, they do not allow, as in other States, that a Man should be deemed guilty of a crime for merely publishing formething in print;

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and they appoint a punishment only against him who has printed things that are in their nature criminal, and who is declared guilty of so doing by twelve of his equals, appointed to determine upon his case, with the precautions we have before described.

The liberty of the press, as established in England, consists therefore, to define it more precisely, in this, That neither the Courts of Justice, nor any other Judges whatever, are authorised to take any notice of writings intended for the press, but are confined to those which are actually printed, and must, in these cases, proceed by the Trial by Jury.

It is even this latter circumstance which more particularly constitutes the freedom of the press. If the Magistrates, though confined in their proceedings to cases of criminal publications, were to be the sole Judges of the criminal nature of the things published, it might easily happen that, with regard to a point which, like this, so highly excites the jealousy of the governing Powers, they would exert themselves with so much spirit and perseverance, that they might, at length, succeed in completelely striking off all the heads of the hydra.

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But whether the authority of the Judges be exerted at the motion of a private individual, or whether it be at the instance of the Government

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itself, their sole office is to declare the punishment established by the law:—it is to the Jury alone that it belongs to determine on the matter of law, as well as on the matter of fact; that is, to determine, not only whether the writing which is the subject of the charge has really been composed by the Man charged with having done it, and whether it be really meant of the person named in the indictment,—but also whether its contents are criminal.

And though the law in England does not allow a Man, profecuted for having published a libel, to offer to support by evidence the truth of the facts contained in it, (a mode of proceeding which would be attended with very mischievous consequences, and is every where prohibited), yet as the indictment is to express that the facts are false, malicious, &c. and the Jury, at the same time, are sole masters of their verdict, that is, may ground it upon what conconfiderations they please, it is very probable that they would acquit the accused party, if the fact, afferted in the writing before them, were matter of undoubted truth, and of a general evil tendency. They, at least, would certainly have it in their power.

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<sup>\*</sup> In actions for damages between individuals, the case if I mistake not, is different, and the defendant is allowed to produce evidence of the facts afferted by him.

And this would still more likely be the case if the conduct of the Government itself was arraigned; because, besides this conviction which we suppose in the Jury, of the certainty of the facts, they would also be influenced by their sense of a principle generally admitted in England, and which, in a late celebrated cause, has been strongly insisted upon, viz. That, "though to speak ill of individuals was deserving of representation, yet the public acts of Government ought to lie open to public examination, and that it was a service done to the State to can"vass them freely"."

And indeed this extreme fecurity with which every man in England is enabled to communicate his fentiments to the Public, and the general concern which matters relative to the Government are always fure to create, has wonderfully multiplied all kinds of public papers. Besides those which, being published at the end of every year, month, or week, present to the reader a recapitulation of every thing interesting that may have been done or said during their respective periods, there are several others, which making their appearance

<sup>\*</sup> See Serjeant Glynn's Speech for Woodfall in the profecution again the latter, by the Attorney-General, for publishing Junius's letter to the King.

every day, or every other day, communicate to the public the several measures taken by the Government, as well as the different causes of any importance, whether civil or criminal, that occur in the Courts of Justice, and sketches from the speeches either of the Advocates, or the Judges, concerned in the management and decision of them. During the time the Parliament continues sitting, the votes or resolutions of the House of Commons, are daily published by authority; and the most interesting speeches in both Houses, are taken down in short-hand, and communicated to the Public, in print.

Lastly, the private anecdotes in the Metropolis, and the Country, concur also towards filling the collection; and as the several public papers circulate, or are transcribed into others, in the different Country Towns, and even find their way into the villages, where every Man, down to the labourer, peruses them with a fort of eagerness, every individual thus becomes acquainted with the State of the Nation, from one end to the other; and by these means the general intercourse is such, that the three Kingdoms seem as if they were one single Town.

And it is this public notoriety of all things, that conflitutes the supplemental power, or check, which, we have above faid, is so useful to remedy

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the unavoidable infufficiency of the laws, and keep within their respective bounds all those persons who enjoy any share of public authority.

As they are thereby made fensible that all their actions are exposed to public view, they dare not venture upon those acts of partiality, those secret connivances at the iniquities of particular persons, or those vexatious practices, which the Man in office is but too apt to be guilty of, when, exercifing his office at a diffance from the public eye, and as it were in a corner, he is fatisfied that provided he be cautious, he may dispense with being just. Whatever may be the kind of abuse in which persons in power may, in such a state of things, be tempted to indulge themselves, they are convinced that their irregularities will be immediately divulged. The Juryman, for example, knows that his verdict, the Judge, that his direction to the Jury, will prefently be laid before the Public: and there is no Man in office, but who thus finds himself compelled, in a most every instance, to choose between his duty, and the furrender of all his former reputation.

It will, I am aware, be thought that I speak in too high terms of the effects produced by the public news-papers. I indeed confess that all the pieces contained in them are not patterns of good reasoning, or of the truest Attic wit; but, on the

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other hand, it fcarcely ever happens that a fubject in which the laws, or in general the public welfare, are really concerned, fails to call forth fome able writer, who, under fome form or other, communicates to the public his observations and complaints. I shall add here, that, though an upright Man labouring for a while under a ftrong popular prejudice, may, supported by the conscioufness of his innocence, indure with patience the severest imputations, the guilty Man, hearing nothing in the reproaches of the public, but what he knows to be true, and already upbraids himself with, is very far from enjoying any such comfort; and that, when a man's own conscience takes part against him, the most despicable weapon is fufficient to wound him to the quick \*.

\* I shall take this occasion to observe, that the liberty of the press is so far from being injurious to the reputation of individuals, (as some persons have complained) that it is, on the contrary, its surest guard. When there exists no means of communication with the Public, every one is exposed, without defence, to the secret shafts of malignity and envy. The Man in office loses his reputation, the Merchant his credit, the private individual his character, without so much as knowing, either who are his enemies, or which way they earry on their attacks. But when there exists a free press, an innocent Man immediately brings the matter into open day, and crushes his adversaries, at once, by a public challenge to lay before the public the grounds of their several imputations.

Even those persons whose greatness seems most to set them above the reach of public censure, are not those who least seel its effects. They have need of the suffrages of that vulgar whom they effect to despise, and who are, aster all, the dispensers of that glory which is the real object of their ambitious cares. Though all have not so much sincerity as Alexander, they have equal reasons to exclaim, O People! what toils do we not undergo, in order to gain your applause!

I confess that in a State where the People dare not speak their sentiments, but with a view to please the ears of their rulers, it is possible that either the Prince, or those to whom he has trusted his authority, may sometimes mistake the nature of the public sentiments, or that, for want of that affection of which they are denied all possible marks, they may rest contented with inspiring terror, and make themselves amends in beholding the over-awed multitude smother their complaints.

But when the laws give a full scope to the People for the expression of their sendments, those who govern cannot conceal from themselves the disagreeable truths which resound from all sides. They are obliged to put up even with ridicule; and the coarsest jests are not always

those which give them the least uneasiness. Like the lion in the fable, they must bear the blows of those enemies whom they depise the most; and they are, at length, stopped short in their career, and compelled to give up those unjust pursuits which they find to draw upon them, instead of that admiration which is the proposed end and reward of their labours, nothing but mortification and disgust.

In short, whoever considers what it is that constitutes the moving principle of what we call great affairs, and the invincible fensibility of Man to the opinion of his fellow-creatures, will not hefitate to affirm that, if it were possible for the liberty of the press to exist in a despotic government, and (what is not less difficult) for it to exist without changing the constitution, this liberty of the press would alone form a counterpoise to the power of the Prince. If, for example, in an empire of the East, a fanctuary could be found, which, rendered respectable by the ancient religion of the people, might enfure fafety to those who should bring thither their observations of any kind, and that from thence printed papers should issue, which, under a certain seal, might be equally respected, and which in their daily appearance should examine and freely discuss the conduct of

the Cadis, the Bashaws, the Vizir, the Divan, and the Sultan himfelf,-that would introduce immediately some degree of liberty.

a quite of which easy full off on the fifth oppor-There was it and come made assets both a william

# CHAP. XIII.

The Subject continued.

A NOTHER effect, and a very confiderable one, of the liberty of the press, is, that it enables the People effectually to exert those means which the Constitution has bestowed on them, of influencing the motions of the Government

It has been observed in a former place, how it came to be a mater of impossibility for any large number of men when obliged to act in a body, and upon the fpot, to take any well-weighed refolution. But this inconvenience, which is the inevitable consequence of their situation, does in no wise argue a personal inferiority in them, with respect to the few who, from fome accidental advantages, are enabled to influence their determinations. It is not Fortune, it is Nature, that has made the effential differences between Men; and whatever appellation a small number of persons who speak without fufficient reflection, may affix to the general body of their fellow-creatures, the whole dif-

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ference between the Statesman, and many a Man from among what they call the dregs of the People, often lies in the rough outside of the latter; a disguise which may fall off on the first opportunity; and more than once has it happened, that from the middle of a multitude in appearance contemptible, there have been seen to rise at once Viriatuses, or Spartacuses.

Time, and a more favourable fituation (to repeat it once more) are therefore the only things wanting to the People; and the freedom of the press affords the remedy to these disadvantages. Through its affiftance every individual may at his leifure and in retirement, inform himfelf of every thing that relates to the questions on which he is to take a refolution. Through its affiftance, a whole Nation, as it were, holds a Council, and deliberates; flowly indeed (for a Nation cannot be informed like an affembly of Judges), but after a regular manner, and with certainty. Through its affiftance, all matters of fact, are, at length, made clear; and, through the conflict of the different answers and replies, nothing at last remains but the found part of the arguments \*.

Hence,

<sup>•</sup> This right of publicly discussing political Subjects is alone a great advantage to People who enjoy it; and if the Citizens of Geneva, for instance have preserved the liberty bet-

Hence, though all good Men may not think themselves obliged to concur implicitly in the tumultuary resolutions of a People whom their Orators take pains to agitate, yet, on the other hand, when this same People, left to itself, perseveres in opinions which have for a long time been discussed in public writings, and from which (it is essential to add) all errors concerning sacts have been removed, such perseverance is certain-

better than the People have been able to do in the other Commonwealths of Switzerland, it is, I think, owing to the extensive right they possess of making public remonstrances to their Magistrates. To these remonstrances the Magistrates, for instance the Council of Twenty-five, to which they are usually made, are obliged to give an answer. I this answer does not satisfy the remonstrating Citizens, they take time, perhaps two or three weeks, to make a reply to it, which must also be answered; and the number of Citizens who go up with each new remonstrance increases, according as they are thought to have reason on their side. Thus, the remonstrances which were made some years ago, on account of the sentence against the celebrated M. Rousseau, and were delivered at first by only forty Citizens, were afterwards often accompanied by about nine hundred .- This circumstance. together with the ceremony with which those remonstrances (or Representations, as they more commonly call them) are delivered, has rendered them a great check on the conduct of the Magistrates: they even have been still more useful to the Citizens of Geneva, as a preventative than as a remedy; and nothing is more like to deter the Magistrates from taking a step of any kind than the thought that it will give rife to a Representation.

ly a very respectable decision; and then it is, though only then, that we may with safety say,—
"the voice of the People is the voice of God."

How therefore can the People of England att, when, having formed opinions which may really be called their own, they think they have just cause to complain against the Administration? It is, as has been said above, by means of the right they have of electing their Representatives; and the same method of general intercourse that has informed them with regard to the objects of their complaints, will likewise enable them to apply t remedy to them.

Through this means they are acquainted with the nature of the subjects that have been deliberated upon in the Assembly of their Representatives;—they are informed by whom the different motions were made,—by whom they were supported; and the manner in which the suffrages are delivered, is such that they always can know the names of those who have voted consequently for the advancement of pernicious measures.

And the People not only know the particular dispositions of every Member of the House of Commons; but the general notoriety of all things give them also a knowledge of the political sentiments of a great number of those, whom

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their situation in life renders fit to fill a place in that House. And availing themselves of the several vacancies that happen, and still more of the opportunity of a general election, they purify either successively, or at once, the Legislative Assembly; and thus, without any commotion or danger to the State, they effect a material reformation in the views of the Government.

I am aware that some persons will doubt these patriotic and systematic views, which I am here attributing to the People of Englaud, and will object to me the disorders that sometimes happen at Elections. But this reproach, which, by the way, comes with but little propriety from Writers who would have the People transact every thing in their own persons, this reproach, I say, though true to a certain degree, is not however so much so as it is thought by certain persons who have taken only a superficial survey of the state of things.

Without doubt, in a Constitution in which all important causes of uneasiness are so effectually prevented, it is impossible but that the People will have long intervals of inattention. Being then called upon, on a sudden, from this state of inactivity, to elect Representatives, they have not examined beforehand, the merits of those who ask them their votes; and the latter have not had,

amidst the general tranquillity, any opportunity to make themselves known to them.

The Elector, perfuaded, at the fame time, that the perfon whom he will elect, will be equally interested with himself in the support of public liberty, does not enter into laborious disquisitions, and from which he sees he may exempt himself. Obliged, however, to give the preserence to somebody, he forms his choice on motives which would not be excuseable, if it were not that some motives are necessary to make a choice, and that, at this instant, he is not insluenced by any other: and indeed it must be confessed, that, in the ordinary course of things, and with Electors of a certain rank in life, that Candidate who gives the best entertainment, has a great chance to get the bester of his competitors.

But if the measures of Government, and the reception of those measures in Parliament, by means of a too complying House of Commons, should ever be such as to spread a serious alarm among the People, the same causes which have concurred to establish public liberty, would, no doubt, operate again, and likewise concur in its support. A general combination would then be formed, both of those Members of Parliament who have remained true to the public cause, and of persons of every order among the People.

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Public meetings, in fuch circumstances, would be appointed, general subscriptions would be entered into, to support the expences, whatever they might be, of such a necessary opposition; and all private and unworthy purposes being suppressed by the sense of the National danger, the choice of the electors would then be wholly determined by the consideration of the public spirit of the Candidates, and the tokens given by them of such spirit.

Thus were those Parliaments formed, which suppressed arbitrary taxes and imprisonments. Thus was it, that, under Charles the Second, the People, when recovered from that enthusiasm of affection with which they received a King fo long perfecuted, at last returned to him no Parliaments but fuch as were composed of a majority of Men attached to public liberty. was, that, perfevering in a conduct which the circumstances of the times rendered necessary, the People baffled the arts of the Government; and Charles diffolved three fuccessive Parliaments. without any other effect but that of having those fame Men re-chosen, and set again in opposition to him, of whom he hoped he had rid himself for ever.

Nor was James the Second happier in his attempt than Charles had been. This Prince foon

experienced that his Parliament was actuated by the fame spirit as those which had opposed the designs of his late brother; and having suffered himself to be led into measures of violence, instead of being better taught by the discovery he made of the real sentiments of the People, his reign was terminated by that catastrophe with which every one is acquainted.

Indeed, if we combine the right enjoyed by the People of England, of electing their Reprefentatives, with the whole of the English Government, we shall become continually more and more fensible of the excellent effects that may refult from that right. All Men in the State are, as has been before observed, really interested in the support of public liberty; -nothing but temporary motives, and fuch as are quite peculiar to themselves, can possibly induce the Members of any House of Commons to connive at measures destructive of this liberty: the People, therefore, under fuch circumstances, need only change these Members, in order effectually to reform the conduct of that House: and it may fairly be pronounced beforehand, that a House of Commons, composed of a new set of persons, will, from this bare circumstance, be in the interests of the People.

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Hence, though the complaints of the People do not always meet with a speedy and immediate redress (a celerity which would be the symptom of a fatal unsteadiness in the Constitution, and would sooner or later bring on its ruin) yet, when we attentively consider the nature and the resources of this Constitution, we shall not think it too bold an affertion to say, that it is impossible but that complaints in which the People persevere, that is, to repeat it once more, well-grounded complaints, will sooner or later be redressed.

#### CHAP. XIV.

# Right of Resistance.

BUT all those privileges of the People, considered in themselves, are but seedle desences against the real strength of those who govern. All those provisions, all those reciprocal Rights, necessarily suppose that things remain in their legal and settled course; what would then be the resource of the People, if ever the Prince, suddenly freeing himself from all restraint, and throwing himself as it were out of the Constitution, should no longer respect either the person, or the pro-

perty of the subject, and either should make no account of his convention with his Parliament, or attempt to force it implicitly to submit to his will?—It would be resistance.

Without entering here into the discussion of a doctrine which would lead us to enquire into the first principles of Civil Government, consequently engage us in a long disquisition, and with regard to which, besides, persons free from prejudices agree pretty much in their opinions, I shall only observe here (and it will be sufficient for my purpose) that the question has been decided in favour of this doctrine by the Laws of England, and that resistance is looked upon by them as the ultimate and lawful resource against the violences of Power.

It was refistance that gave birth to the Great Charter, that lasting foundation of English Liberty; and the excesses of a Power established by force, were also restrained by force. It has

\* Lord Lyttelton fays extremely well, in his Persian Letters, "If the privileges of the People of England be concessed from the Crown, is not the power of the Crown it." felf, a concession from the People?" It might be said with equal truth, and somewhat more in point to the subject of this Chapter, — If the privileges of the People be an encroachment on the power of Kings, the power itself of Kings was at first an encroachment (no matter whether effected by surprize) on the natural liberty of the People.

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been by the same means that, at different times, the People have procured the confirmation of the same Charter. Lastly, it has also been the Resistance to a King who made no account of his own engagements, that has, in the issue, placed on the Throne the samily which is now in possession of it.

This is not all; this refource which, till then, had only been an act of force, opposed to other acts of force, was, at that æra, expresly recognised by the Law itself. The Lords and Commons, solemnly affembled, declared, that "King "James the Second, having endeavoured to sub-"vert the Constitution of the Kingdom, by breaking the original contract between King and People, and having violated the funda-"mental laws, and withdrawn himself, had ab-"dicated the Government; and that the Throne was thereby vacant "."

And lest those principles to which the Revolution thus gave a fanction, should, in process of time, become mere arcana of State, exclusively appropriated, and only known to a certain class of Subjects, the same Act, we have just mentioned, expressly insured to individuals the right of

<sup>•</sup> The Bill of Rights has fince given a new fanction to all these principles.

publicly preferring complaints against the abuses of Government, and moreover, of being provided with arms for their own defence. Judge Blackstone expresses himself in the following terms, in his Commentaries on the Laws of England (B. I. Ch. i.)

"And lastly, to vindicate those rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration, and free course of justice in the Courts of law; next, to the right of petitioning the King and Parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and, defence."

Laftly, this right of opposing violence, in whatever shape, and from whatever quarter it may come, is so generally acknowledged, that the Courts of law have sometimes grounded their judgments upon it. I shall relate on this head a saft which is somewhat remarkable.

A Constable, being out of his precinct, arrested a woman whose name was Anne Dekins; one Tooly took her part, and in the heat of the fray, killed the affistant of the Constable.

Being profecuted for murder, he alledged, in his defence, that the illegality of the imprisonment was a fufficient provocation to make the homihomicide excusable, and intitle him to the benefit' of Clergy. The Jury having settled the matter of sact, lest the criminality of it to be decided by the Judge, by returning a special verdict. The cause was adjudged to the King's Bench, and thence again to Serjeant's Inn, for the opinion of the twelve Judges. Here follows the opinion delivered by Chief Justice Holt, in giving judgment.

"If one be imprisoned upon an unlawful au"thority, it is a sufficient provocation to all peo"ple, out of compassion, much more so when
"it is done under colour of justice; and when
"the liberty of the subject is invaded, it is a pro"vocation to all his subjects of England. A Man
"ought to be concerned for Magna Charta and
"the laws; and if any one against law imprison
"a Man, he is an offender against Magna
"Charta." After some debate, occasioned chiefly by Tooly's appearing not to have known that
the Constable was out of his precinct, seven of
the Judges were of opinion that the prisoner was
guilty of Manslaughter, and he was admitted to
the benefit of the Clergy \*.

But it is with respect to this right of an ul-

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<sup>\*</sup> See Reports of Cases argued, debated, and adjudged, in Banco Regina, in the time of the late Queen Anne.

timate resistance, that the advantage of a free press appears in a most conspicuous light. As the most important rights of the People, without the prospect of a resistance which overawes those who should attempt to violate them, are little more than mere shadows,—so this right of resisting, itself, is but vain, when there exists no means of effecting a general union between the different parts of the People.

Private individuals, unknown to each other, are forced to bear in filence injuries in which they do not fee other people take a concern. Left to their own individual strength, they tremble before the formidable and ever-ready power of those who govern; and as these latter well know, nay, are apt to over-rate the advantages of their own situation, they think that they may venture upon any thing.

But when they fee that all their actions are exposed to public view,—that in consequence of the celerity with which all things become communicated, the whole Nation forms, as it were, one continued irritable body, no part of which can be touched without exciting an universal tremor, they become sensible that the cause of each individual is really the cause of all, and that to attack the lowest among the People, is to attack the whole People.

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Here also we must remark the error of those who, as they make the liberty of the People to consist in their power, so make their power consist in their action.

When the People are often called to act in their own persons, it is impossible for them to acquire any exact knowledge of the state of things. The event of one day essaces the notions which they had begun to adopt on the preceding day; and amidst the continual change of things, no settled principle, and above all no plans of union, have time to be established among them.—You wish to have the People love and defend their laws and liberty; leave them, therefore, the necessary time to know what laws and liberty are, and to agree in their opinion concerning them;—you wish an union, a coalition, which cannot be obtained but by a slow and peaceable process, forbear therefore continually to shake the vessel.

Nay farther, it is a contradiction, that the People should as, and at the same time retain any real power. Have they, for instance, been forced by the weight of public oppression to throw off the restraints of the law, from which they no longer received protection, they presently find themselves suddenly become subject to the command of a few Leaders, who are the more absolute in proportion as the nature of their power is

#### JIE THE CONSTITUTION

less clearly ascertained: nay, perhaps, they must even submit to the toils of war, and to military discipline.

If it be in the common and legal course of things that the People are called to move, each individual is obliged, for the success of the measures in which he is then made to take a concern, to join himself to some party; nor can this party be without a Head. The Citizens thus grow divided among themselves, and contract the pernicious habit of submitting to Leaders. They are, at length, no more than the clients of a certain number of Patrons; and the latter son becoming able to command the arms of the Citizens in the same manner as they at first governed their votes, make little account of a People with one part of which they know how to curb the other.

But when the moving springs of Government are placed entirely out of the body of the People, their action is thereby disengaged from all that could render it complicated, or hide it from the eye. As the People thenceforward consider things speculatively, and are, if I may be allowed the expression, only spectators of the game, they acquire just notions of things; and as these notions, amidst the general quiet, get ground and spread themselves far and wide, they at length

entertain, on the subject of their liberty, but one opinion.

Forming thus, as it were, one body, the People, at every instant, have it in their power to strike the decisive blow which is to level every thing. Like those mechanical powers the greatest efficiency of which exists at the instant which precedes their entering into action, it has an immense force, just because it does not yet exert any; and in this state of stillness, but of attention, consists its true momentum.

With regard to those who (whether from perfonal privileges, or by virtue of a commission from the People) are intrusted with the active part of Government, as they, in the mean while, fee themselves exposed to public view, and obferved as from a distance by Men free from the spirit of party, and who place in them but a conditional truft, they are afraid of exciting a commotion which, though it might not prove the destruction of all power, yet would surely and immediately be the destruction of their own. And if we might suppose that, through an extraordinary conjunction of circumstances, they should refolve among themselves upon the facrifice of those laws on which public liberty is founded, they would no fooner lift up their eyes towards that extensive Assembly which views them with a

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watchful attention, than they would find their public virtue return upon them, and would make hafte to refume that plan of conduct out of the limits of which they can expect nothing but ruin and perdition.

In short, as the body of the People cannot act without either subjecting themselves to some Power, or effecting a general destruction, the only share they can have in a Government with advantage to themselves, is not to interfere, but to influence,—to be able to act, and not to act.

The Power of the People is not when they ftrike, but when they keep in awe: it is when they can overthrow every thing, that they never need to move; and Manlius included all in four words, when he faid to the People of Rome, Oftendite bellum, pacem babebitis.

#### CHAP. XIV.

Proofs drawn from Fasts, of the Truth of the Principles laid down in the present Work.—1. The peculiar Manner in which Revolutions have always been concluded in England.

IT may not be fufficient to have proved by arguments the advantages of the English Constitution: it will perhaps be asked, whether the effects

effects correspond to the theory? To this question (which I confess is extremely proper) my answer is ready; it is the same which was once made, I believe, by a Lacedæmonian, Come and see.

If we peruse the English History, we shall be particularly struck with one circumstance to be observed in it, and which distinguishes most advantageously the English Government from all other free governments; I mean the manner in which Revolutions and public commotions have always been terminated in England,

If we read with some attention the History of other free States, we shall see that the public dissensions that have taken place in them, have constantly been terminated by settlements in which the interests only of a sew were really provided for; while the grievances of the many were hardly, if at all, attended to. In England the very reverse has happened, and we find Revolutions always to have been terminated by extensive and accurate provisions for securing the general liberty.

The History of the ancient Grecian Commonwealths, but above all of the Roman Ropublic, of which more complete accounts have been left us, afford striking proof of the former part of this observation.

What was, for instance, the consequence of that great Revolution by which the Kings were driven from Rome, and in which the Senate and Patricians acted as the advisers and leaders of the People? The confequence was, as we find in Dionyfius of Halicarnassus, and Livy, that Senators immediately affumed all those powers lately so much complained of by themselves, which the Kings had exercised. The execution of their future decrees was intrusted to two Magistrates, taken from their own body, and entirely dependdent on them, whom they called Confuls, and who were made to bear about them all the enfigns of power which had formerly attended the Kings. Only, care was taken that the axes and fasces, the fymbols of the power of life and death over the Citizens, which the Senate now claimed to itself, should not be carried before both Confuls at once. but only before one at a time, for fear, fays Livy, of doubling the terror of the People \*.

Nor was this all: the Senators drew over to their party those Men who had the most interest at that time among the People, and admitted

<sup>\* &</sup>quot; Omnia jura (Regum) omnia infignia, primi Consules tenuere; id modò cautum est ne si ambo sasces haberent, duplicatus terror videretur." Tit. Liv. lib, ii. § 1.

them as Members into their own body † : which indeed was a precaution they could not prudently avoid taking. But the interests of the great Men in the Republic being thus provided for, the Revolution ended. The new Senators, as well as the old, took care not to leffen, by making provisions for the liberty of the People, a power which was now become their own. Nav. they prefently firetched this power beyond its former tone; and the punishments which the Conful inflicted in a military manner on a number of those who still adhered to the former mode of Government, and even upon his own children, taught the People what they had to expect for the future, if they prefumed to oppose the power of those whom they had thus unwarily made their Mafter

Among the oppressive laws, or usages, which the Senate, after the expulsion of the Kings, had permitted to continue, those which were most complained of by the People, were those by which those Citizens who could not pay their debts with the interest (which at Rome was enormous) at the appointed time, became flaves to their Creditors, and were delivered over to them

<sup>+</sup> These new Senators were called conscripti : hence the name of Patres Conscripti, afterwards indiscriminately given to the whole Senate .- Tit. Liv. ibid.

bound with cords: hence the word Nexi, by which that kind of Slaves were denominated. The cruelties exercised by Creditors on those unfortunate Men, whom the private calamities caused by the frequent wars in which Rome was engaged, rendered very numerous, at last roused the body of the People: they abandoned both the City, and their inhuman sellow-citizens, and retreated to the other side of the River Anio.

But this fecond Revolution, like the former, only procured the advancement of particular perfons. A new office was created, called the Tribuneship. Those whom the People had placed at their head when they left the City, were raised to it. Their duty, it was agreed, was for the future to protect the Citizens: and they were invested with a certain number of prerogatives for that purpose. This institution, it must however, be confessed, would have, in the issue, proved very beneficial to the People, at least for a long course of time, if certain precautions had been taken with respect to it, which would have much lessened the future personal importance of the new Tribunes\*: but these precautions the latter did

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<sup>•</sup> Their number which was only Ten, ought to have been much greater; and they never ought to have accepted the power left to each of them, of stopping by his single oppofition the proceedings of all the rest.

not think proper to suggest; and in regard to those abuses themselves which had at first given rise to the complaints of the People, no farther mention was made of them †.

As the Senate and Patricians, in the early ages of the Commonwealth, kept closely united together, the Tribunes, for all their personal privileges, were not able, however, during the first times after their creation, to gain an admittance either to the Confulship, or into the Senate, and thereby to separate their condition any farther from that of the People. This fituation of their's, in which it was to be wished they might always have been kept, produced at first excellent effects, and caused their conduct to answer in a great measure, the expectations of the People. The Tribunes complained loudly of the exorbitancy of the powers possessed by the Senate and Confuls; and here we must observe, that the power exercised by these latter over the lives of the Citizens, had never been yet subjected (which will probably furprize the Reader), to any known laws, though fixty years had already elapfed fince the expulsion of the Kings. The Tribunes therefore infifted, that laws should be made in

<sup>†</sup> A number of seditions were afterwards raised upon the same account.

that respect, which the Consuls should thenceforwards be bound to follow; and that they should no longer be lest in the exercise of their power over the lives of the Citizens, to their own caprice and wantonness.

Equitable as these demands were, the Senate and Patricians opposed them with great warmth, and either by naming Dictators, or calling in the affistance of the Priests, or other means, they defeated for nine years together, all the endeavours of the Tribunes. However, as the latter were at that time in earnest, the Senate was at length obliged to comply; and the Lex Terentilla was passed, by which it was enacted, that a general Code of Laws should be made.

These beginnings seemed to promise great success to the cause of the People. But, unfortunately for them, the Senate sound means to have it agreed, that the office of Tribune should be set aside during the whole time that the Code should be framing. They moreover obtained, that the ten Men, called Decemvirs, to whom the charge of composing this Code, was to be given, should be taken from the body of the Patricians. The same causes, therefore, produced again the

<sup>&</sup>quot; Quod Populus in se jus deterit, eo Consulem usurum; non spsos libidinem ac licentiam suam prelege habituros."—
Tit. Liv. ib. iii. § 9.

fame effects; and the power of the Senate and Conful was left in the new Code, or laws of the Twelve Tables, as undefined as before. As to the laws above mentioned, concerning debtors, which never had ceased to be bitterly complained of by the People, and in regard to which some satisfaction ought in common justice, to have been given them, they were confirmed, and a new terror added to them from the manner in which they were worded.

The true motive of the Senate, when they thus trusted the framing of the new laws to a new kind of Magistrates, called Decemvirs, was that, by fuspending the ancient office of Conful, they might have a fair pretence for fuspending also the office of Tribune, and thereby rid themselves of the People, during the time that the important business of framing the Code should be carrying on: they even, in order the better to fecure that point, placed the whole power in the Republic, in the hands of these new Magistrates. But the Senate and Patricians experienced then, in their turn, the danger of entrusting Men with an uncontrolled authority. As they themselves had formerly betrayed the trust which the People had placed in them, so did the Decemvirs, on this occasion, likewise deceive them. They retained by their own private authority, the unlimited

mited power that had been conferred on them, and at last exercised it on the Patricians as well as the Plebeians. Both parties therefore united against them, and the Decemvirs were expelled from the City.

The former dignities of the Republic were restored, and with them the office of Tribune. Those from among the People who had been most instrumental in destroying the power of the Decemvirs, were as it was natural, raifed to the Tribuneship; and they entered upon their offices possessed of a prodigious degree of popularity. The Senate and the Patricians were at the fame time, funk extremely low in consequence of the long tyranny which had just expired; and those two circumstances united, afforded the Tribunes but too easy an opportunity of making the prefent Revolution end as the former ones had done. and converting it to the advancement of their own power. They got new personal privileges to be added to those which they already possessed, and moreover procured a law to be enacted, by which it was ordained, that the refolutions taken by the Comitia Tributa (an Affembly in which the Tribunes were admitted to propose new laws) should be binding upon the whole Commonwealth: -by which they at once raised to themselves an imperium

perium in imperio, and acquired, as Livy expresses it, a most active weapon .

From that time great commotions arose in the Republic, which, like all those before them, ended in promoting the power of a few .- Propofals for easing the people of the debts, for dividing with fome equality amongst the Citizens the lands which were taken from the enemy, and for lowering the rate of the interest of money, were frequently made by the Tribunes. And indeed all these were excellent regulations to propose; but, unfortunately for the People, the propofals of them were only pretences made use of by the Tribunes for promoting schemes of a fatal though fomewhat remote, tendency, to public liberty. Their real aims were at the Confulship, the Prætorship, the Priesthood, and other offices of Executive power, which they were intended to controul, and not to share. To these views they constantly made the cause of the People subserva ient :- I shall relate among other instances, the manner in which they procured to themselves an admittance to the office of Conful.

Having, during feveral years, feized every opportunity of making speeches to the People on that subject, and even excited seditions in order to overcome the opposition of the Senate, they at

<sup>&</sup>quot; Acerrimum telum.

last availed themselves of the circumstances of an interregnum (a time, during which there happened to be no other Magistrates in the Republic befides themselves) and proposed to the Tribes, whom they had affembled, to enact the three following laws:-the first, for settling the rate of interest of money; the second, for ordaining that that no Citizen should be possessed of more than five hundred acres of land; and the third for providing that one of the two Confuls be taken from the body of the Plebeians. But on this occasion it evidently appeared, fays Livy, which of the laws in agitation were most agreeable to the People, and which to those who proposed them; for the Tribes accepted the laws concerning the interest of money, and the lands; but as to that concerning the Plebeian Confulship, they rejected it: and both the former articles would from that moment have been fettled, if the Tribunes had not declared, that the Tribes were called upon, either to accept, or reject, all their three propofals at once . Great commotions enfued thereupon, for a whole year; but at last the Tri-

<sup>&</sup>quot;Ab Tribunis, velut per interregnum, concilio Plebis habito, apparuit quæ ex promulgatis Plebi, quæ latoribus, gratiora essent; nam de scenore atque agro rogationes jubebant, de plebeio Consulatu antiquabant (antiquis stabunt; & persecta utraque res esset, ni Tribuni se in omnia simul consulere Plebem dixissent."—Tit. Liv. lib. vi. § 29.

bunes, by their perfeverance in infifting that the Tribes should vote on their three rogations, jointly, obtained their ends, and overcame both the opposition of the Senate, and the reluctance of the People.

In the fame manner did the Tribunes get themselves made capable of filling all other places of executive power, and public truft, in the Republic. But when all their views of that kind were accomplished, the Republic did not for all this enjoy more quiet, nor was the interest of the People better attended to, than before. New struggles then arose for actual admission to those places; for procuring them to relations, or friends; for governments of provinces, and commands of armies. A few Tribunes, indeed, did at times apply themselves seriously, out of real virtue and love of their duty, to remedy the grievances of the People; but both their fellow Tribunes as we may fee in History, and the whole body of those Men upon whom the People had, at different times, bestowed Consulships, Ædileships, Censorships, and other dignities without number, united together with the utmost vehemence against them; and the real Patriots, fuch as Tiberius Gracchus, Caius Gracchus, and Fulvius, constantly perished in the attempt.

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I have been fomewhat explicit on the effects produced by the different Revolutions that have happened in the Roman Republic, because its History is much known to us, and we have, either in Dionisius of Halicarnassus, or Livy, considerable monuments of the more ancient part of it. But the Hiftory of the Grecian Commonwealths would also have supplied us with a number of facts to the same purpose. That Revolution, for instance, by which the Pifistratide were driven out of Athens-that by which the Four bundred, and afterwards the Thirty, were established, as well as that by which the latter were in their turn expelled, all ending in fecuring the power of a few. The Republic of Syracufe, that of Corcyra, of which Thucydides has left us a pretty full account, and that of Florence, of which Machiavel has written the History, also present us a series of public commotions ended by treaties, in which, as in the Roman Republic, the grievances of the People, though ever fo loudly complained of in the beginning by those who acted as their defenders, were, in the iffue, most carelessly attended to, or even totally difregarded ..

But

The Revolutions which have formerly happened in France, have all ended like those above mentioned: of this a remarkable instance may be seen in the note \* p. 29, 30. of this Work.

But if we turn our eyes towards the English History, scenes of a quite different kind will offer to our view; and we shall find, on the contrary, that Revolutions in England have always been terminated by making such provisions, and only such, as all orders of the People were really and indiscriminately to enjoy.

Most extraordinary facts, these! and which, from all the other circumstances that accompanied them, we see, all along, to have been owing to the impossibility (a point that has been so much insisted upon in former Chapters) in which those who possessed the considerce of the People, were, of transferring to themselves any branch of the Executive authority, and thus separating their own condition from that of the rest of the People.

Without mentioning the compacts which were made with the first Kings of the Norman line, let us only cast our eyes on Magna Charta, which is still the soundation of English liberty. A number of circumstances which has been described in the former part of this work, con-

Work. The same facts are also to be observed in the History of Spain, Denmark, Sweden, Scotland, &c.; but I have avoided mentioning States of a Monarchical form, till some observations are made, which the Reader will find in the XVIIth Chapter.

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curred at that time to strengthen the Regal power to fuch a degree that no Men in the State could entertain a hope of fucceeding in any other design than that of setting bounds to it. How great was the union which thence arose among all orders of the People !- what extent, what caution, do we fee in the provisions made by the Great Charter! All the objects for which men naturally wish to live in a state of Society, were fettled in its thirty-eight Articles. judicial authority was regulated. The person and property of the individual were fecured. fafety of the Merchant and stranger was provided for. The higher class of Citizens gave up a number of oppressive privileges which they had long fince accustomed themselves to look upon as their undoubted rights \*. Nay, the implements of tillage of the Bondman, or Slave, were also secured to him: and for the first time perhaps in the annals of the World, a civil war was terminated by making stipulations in favour of those unfortunate Men to whom the avarice and lust of dominion inherent in human Nature, continued, over the greatest part of the Earth, to deny the common rights of Mankind.

Under

<sup>\*</sup> All possessors of lands took the engagement to establish in behalf of their Tenants and Vassals (erga fuos) the same liberties which they demanded from the King.—Mag. Char. cep. xxxviii.

Under Henry the Third great disturbances arose; and they were all terminated by solemn confimations given to the Great Charter. Under Edward I. Edward II. Edward III. and Richard II. those who were intrusted with the care of the interests of the People, lost no opportunity that offered, of strengthening still farther that soundation of public liberty, of taking all such precautions as might render the Great Charter still more effectual in the event.—They had not ceased to be convinced that their cause was the same with that of all the rest of the People.

Henry of Lancaster having laid claim to the Crown, the Commons received the law from the victorious party. They settled the Crown upon Henry, by the name of Henry the Fourth; and added to the Act of Settlement, provisions which the Reader may see in the second Volume of the Parliamentary History of England. Struck with the wisdom of the conditions demanded by the Commons, the Authors of the Book just mentioned, observe (perhaps with some simplicity) that the Commons of England were no fools at that time. They ought rather to have said;—The Commons of England were happy enough to form among themselves an Assembly in which every one could propose what matters he pleas-

ed, and freely discuss them;—they had no possibility left of converting either these advantages, or in general the considence which the people had placed in them, to any private views of their own: they, therefore, without loss of time endeavoured to stipulate useful conditions with that Power by which they saw themselves at every instant exposed to be dissolved and dispersed, and applied their industry to insure the safety of the whole People, as it was the only means they had of procuring their own.

In the long contentions which took place between the Houses of York and Lancaster, the Commons remained spectators of disorders which in those times, it was not in their power to prevent: they successively acknowleged the title of the victorious parties; but whether under Edward the Fourth, under Richard the Third, or Henry the Seventh, by whom those quarrels were terminated, they continually availed themselves of the importance of the services which they were able to perform to the new established Sovereign, for obtaining effectual conditions in favour of the whole body of the People.

At the accession of James the First, which, as it placed a new Family on the Throne of England, may be considered as a kind of Révolution, no demands were made by the Men who were at

the head of the Nation, but in favour of general

After the accession of Charles the First, discontents of a very serious nature began to take place, and they were terminated in the first instance, by the Act called the Petition of Right, which is still looked upon as a most precise and accurate delineation of the rights of the People\*.

At the Restoration of Charles the Second, the Costitution being re-established upon its former principles, the former consequences produced by it, began again to take place; and we see at that æra, and indeed during the whole course of that Reign, a continued series of precautions taken for securing the general liberty.

Lastly, the great event which took place in the year 1689, affords a striking confirmation of the truth of the observation made in this Chapter.

• The disorders which took place in the latter part of the reign of that Prince, seem indeed to contain a complete contradiction of the affertion which is the subject of the present Chapter; but they, at the same time, are a no less convincing confirmation of the truth of the principles laid down in course of this whole Work. The above mentioned disorders took rise from that day in which Charles the First gave up the power of dissolving his Parliament: that is, from the day in which the Members of that Assembly acquired an independent, personal, permanent authority, which they soon began to turn against the People who had raised them to it.

At this æra the political wonder again appearedof a Revolution terminated by a feries of public Acts in which no interests but those of the People at large were considered and provided for ;-no clause, even the most indirect, was inserted, either to gratify the present ambition, or favour the future views, of those who were personally concerned in bringing those Acts to a conclusion. Indeed, if any thing is capable of conveying to us an adequate idea of the foundness, as well as peculiarity, of the principles on which the English Government is founded, it is the attentive perufal of the System of public Compacts to which the Revolution of the year 1689 gave rife, -of the Bill of Rights with all its different clauses, and of the feveral Acts which under two subsequent Reigns, till the Accession of the House of Hanover, were made in order to strengthen it,

#### CHAP. XVI.

Second Difference—The Manner after which the Laws for the Liberty of the Subjects are executed in England.

THE second difference I mean to speak of, between the English Government, and that of other free States, concerns the important object

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of the execution of the Laws. On this article, alfo, we shall find the advantage to lie on the side of the English Government; and, if we make a comparison between the History of those States and that of England, it will lead us to the following observation, viz. that, though in other free States the laws concerning the Liberty of the Citizens were imperfect, yet the execution of them was still more defective. In England, on the contrary, the laws for the fecurity of the Subject, are not only very extensive in their provisions, but the manner in which they are executed, carries these advantages still farther: and English Subjects enjoy no less liberty from the spirit both of justice and mildness, by which all branches of the Government are influenced, than from the accuracy of the laws themselves.

The Roman Commonwealth will here again supply us with examples to prove the former part of the above affertion. When I said, in the foregoing Chapter, that, in times of public commotion, no provisions were made for the body of the People, I meant no provisions that were likely to prove effectual in the event. When the People were roused to a certain degree, or when their concurrence was necessary to carry into effect certain resolutions, or measures, that were particularly interesting to the

Men in power, the latter could not, with any prudence, openly profess a contempt for the political wishes of the People; and some declarations expressed in general words, in favour of public liberty, were indeed added to the laws that were enacted on those occasions. But these declarations, and the principles which they tended to establish, were afterwards even openly disregarded in practice.

Thus, when the People were made to vote, about a year after the expulsion of the Kings, that the Regal Government never should be again established in Rome, and that those who should endeavour to restore it, should be devoted to the Gods, an article was added which, in general terms, confirmed to the Citizens the right they had before enjoyed under the King, of appealing to the People from the sentences of death passed upon them. No punishment (which will furprise the Reader) was decreed against those who should violate this law; and indeed the Confuls, as we may fee in Dionyfins of Halicarnassus and Livy, concerned themfelves but little about the appeals of the Citizens, and in the more than military exercise of their functions, continued to fport with rights which they ought to have respected, however imperfectly and loofely they had been fecured.

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An article to the same purport with the above, was afterwards also added to the laws of the Twelve Tables; but the Decemvirs, to whom the execution of those laws was at first committed, behaved exactly in the fame manner, and even worse than the Confuls had done before them; and after they were expelled the Magistrates who succeeded them, appear to have been as little tender of the lives of the Citizens. I shall, among many instances, relate one which will shew upon what slight grounds the Citizens were exposed to have their lives taken away, ---- Spurius Mælius being accused of endeavouring to make himself King, was summoned by the Master of the Horse, to appear before the Dictator, in order to clear himself of this fomewhat extraordinary imputation. rius took refuge among the People; the Mafter of the Horse pursued him, and killed him on the fpot. The multitude having thereupon expressed

<sup>\*</sup> At the time of the expulsion of the Decemvirs, a law was also enacted, that no Magistrate should be created from whom no appeal could be made to the People (Magistratus sine provocatione. Iit. Liv. lib. iii. § 55.) by which the people expressly meant to abolish the Dictatorship: but, from the fact that will just now be related, and which happened about ten years afterwards, we shall see that this law was not better observed than the former ones had been.

a great indignation, the Dictator had them called to his Tribunal, and declared that Spurius had been lawfully put to death, even though he might be innocent of the crime laid to his charge, for having refused to appear before the Dictator, when summoned to do so by the Master of the Horse.

About one hundred and forty years after the times we mention, the law concerning the appeals to the People, was enacted for the third time. But we do not fee that it was better observed afterwards than it had been before: we find it frequently violated, fince that period, by the different Magistrates of the Republic, and the Senate itself, notwithstanding this same law, at times made formidable examples of the Citizens. Of this we have an instance in the three hundred soldiers who had pillaged the Town of Rhegium. The Senate of its own authority ordered them all to be put to death. In vain did the Tribune Flaccus remonstrate against so server an exertion of public justice on Roman Ci-

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<sup>\*</sup> Tumultuantem deinde multitudinem, incerta existimatione facti, ad concionem vocari justit, & Mælium jure cæsum pronunciavit, etiamsi regni crimine insons suerit, qui vocatus à Magistro equitum, ad Dictatorem non venisset. Tit. Liv. lib. iv. § 15.

tizens; the Senate, fays Valerius Maximus, nevertheless persisted in its resolution \*.

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All these laws for securing the lives of the Citizens, had hitherto been enacted without any mention being made of a punishment against those who should violate them. At last the celebrated Lex Porcia was passed, which subjected to banishment those who should cause a Roman Citizen to be scourged and put to death. From a number of instances posterior to this law, it appears that it was not better observed than those before it had been: Caius Gracchus, therefore, caused the Lex Sempronia to be enacted, by which a new fanction was given to it. But this fecond law did not fecure his own life, and that of his friends, better than the Lex Porcia had done that of his brother, and those who had supported him: indeed, all the events which took place about those times, rendered it manifest that the evil was fuch as was beyond the power of any

• Val. Max. book ii. c. 7. This Author does not mention the precise number of those who were put to death on this occasion; he only says that they were executed fifty at a time, in different successive days; but other Authors make the number of them amount to four thousand. Livy speaks of a whole Legion.—Legio Campana quae Rhegium occupaverat, obsessay, diditione facta, securi percussa est.—Tit. Liv. lib. xv. Epit.—I have here followed Polybius, who says that only three hundred were taken and brought to Rome.

laws to cure.—I shall here mention a fact which affords a remarkable instance of the wantonness with which the Roman Magistrates had accustomed themselves to take away the lives of the Citizens. A Citizen, named Memmius, having put up for the Consulship, and publicly canvassing for the same, in opposition to a Man whom the Tribune Saturninus supported, the latter caused him to be apprehended, and made him expire under blows in the public Forum. The Tribune even carried his insolence so far, as Cicero informs us, as to give to this act of cruelty, transacted in the presence of the whole People assembled, the outward form of a lawful act of public Justice.

The fatal forms of words (crusiatus carmina) used by the Roman Magistrates when they ordered a Man to be put to death, resounded (says Tully in his speech for Rabirius) in the Assembly of the People, in which the Censors had sorbidden the common Executioner ever to appear. I Lietor, colliga manus. Caput obnubito. Arbori infelici suspendito.—Memmius being a considerable Citizen, as we may conclude from his canvassing with success for the Consulship, all the great Men in the Republic took the alarm at the atrocious action of the Tribune: the Senate, the next day, issued out its solemn mandate, or form of words, to the Consuls, to provide that the Republic should receive no detriment; and the Tribune was killed in a pitched battle that was sought at the foot of the Capitol.

Nor were the Roman Magistrates fatisfied with committing acts of injuffice in their political capacity, and for the fupport of the power of that Body of which they made a part. Avarice and private rapine were at last added to political ambition. The Provinces were first oppressed and plundered. The calamity, in process of time, reached Italy itself, and the centre of the Republic; till at last the Lex Calpurnia de repetundis was enacted to put a ftop to it. By this law an action was given to the Citizens and Allies for the recovery of the money extorted from them by Magistrates, or Men in power; and the Lex Junia afterwards added the penalty of banishment to the obligation of making restitution.

But here another kind of disorder arose. The Judges proved as corrupt, as the Magistrates had been oppressive. They equally betrayed, in their own province, the cause of the Republic with which they had been intrusted; and rather chose to share in the plunder of the Consuls, the Prætors, and the Proconsuls, than put the laws in force against them.

New expedients were, therefore, reforted to, in order to remedy this new evil. Laws were made for judging and punishing the Judges themselves; and above all, continual changes

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were made in the manner of composing their Assemblies. But the malady lay too deep for common legal provisions to remedy. The guilty Judges employed the same resources in order to avoid conviction, as the guilty Magistrates had done; and those continual changes at which we are amazed, were made in the constitution of the judiciary Bodies, instead of obviating the corruption of the Judges, only transferred to other Men the profit arising from becoming guilty of it. It was grown to be a

The Judges (over the Affembly of whom the Prætor usually presided) were taken from the body of the Senate, till some years after the last Punic War; when the Lex Sempronia, proposed by Caius S. Gracchus, enacted that they should in future be taken from the Equestrian Order. The Conful Capio procured afterwards a law to be enacted, by which the Judges were to be taken from both orders, equally. The Lex Servilia soon after put the Equestrian Order again in possession of the Judgments; and after some years, the Lex Livia restored them entirely to the Senate-The Lex Plautia enacted afterwards, that the Judges should be taken from the three Orders; the Senatorian, Equestrian, and Plebeian. The Lex Cornelia, framed by the Dictator Sylla, enacted again, that the Judges should be entirely taken from the body of the Senate. The Lex Aurelia ordered anew, that they should be taken from the three Orders. Pompey made afterwards a change in their number, which he fixed at feventy-five, and in the manner of electing them. And laftly, Cæsar entirely restored the Judgments to the Order of the Senate.

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general complaint, so early as the times of the Gracchi, that no Man who had money to give, could be brought to punishment. Cicero says, that in his time, the same opinion was become settled and universally received; and his Speeches are full of his lamentations on what he calls the levity, and the insamy, of the public Judgments.

Nor was the impunity of corrupt Judges the only evil under which the Republic laboured. Commotions of the whole Empire at last took place. The horrid vexations, and afterwards the acquittal, of Aquilius, Proconsul of Syria, and of some others who had been guilty of the same crimes, drove the Provinces of Asia to desperation: and then it was that that terrible war of Mithridates arose, which was ushered in by the death of eighty thousand Romans, massacred in one day, in all the Cities of Asia ‡.

The Laws and public Judgments not only thus failed of the end for which they had been established: they even became, at length, new means of oppression added to those which already existed. Citizens possessed of wealth, persons obnoxious to particular Bodies, or the

<sup>\*</sup> App. de Bell. Civ.

<sup>+</sup> Act. in Verr. § i. completed both awar sale andwar

<sup>‡</sup> Appian.

few Magistrates who attempted to stem the torrent of the general corruption, were accused and condemned; while Piso, of whom Cicero in his speech against him relates facts which make the Reader shudder with horror, and Verres, who had been guilty of enormities of the same kind, escaped unpunished.

Hence a war arose still more formidable than the former, and the dangers of which we wonder that Rome was able to furmount. The greatest part of the Italians revolted at once, exasperated by the tyranny of the public Judgments; and we find in Cicero, who informs us of the cause of this revolt, which was called the Social war, a very expressive account both of the unfortunate condition of the Republic, and of the perversion that had been made of the methods taken to remedy it. 'An hundred and ten years are not yet elapsed (says he) since the law for the recovery of money extorted by ' Magistrates was first propounded by the Tribune Calpurnius Pifo. A number of other s laws to the fame effect, continually more and ' more severe, have followed: but so many perfons have been accused, so many condemned, fo formidable a war has been excited in Italy by the terror of the public Judgments, and when the laws and Judgments have been fufpended,

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Allies have prevailed, that we may truly fay

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weakness of others, that we continue to exist \*'.

I have entered into these particulars with regard to the Roman Commonwealth, because the sacts on which they are grounded, are remarkable of themselves, and yet no just conclusion can be drawn from them, unless a series of them were presented to the Reader. Nor are we to account for these sacts, by the Luxury which prevailed in the latter ages of the Republic, by the corruption of the manners of the Citizens, their degeneracy from their ancient principles, and such like loose general phrases, which may perhaps be useful to express the manner itself in which the evil became manifested, but by no means set forth the causes of it.

The above disorders arose from the very nature of the Government of the Republic,—of a Government in which the Executive and Supreme Power being made to centre in the Body of those in whom the People had once placed their considence, there remained no other effectual Power in the State that might render it necessary for them to keep within the bounds of justice and decency. And in the mean time,

<sup>.</sup> See Cic. de Off. lib. ii. § 75.

as the People, who were intended as a check over that Body, continually gave a share in this Executive authority to those whom they entrusted with the care of their interests, they increased the evils they complained of, as it were, at every attempt they made to remedy them, and instead of raising up Opponents to those who were become the enemies of their liberty, as it was their intention to do, they continually supplied them with new Associates.

From this fituation of affairs, flowed, as an unavoidable confequence, that continual defertion of the cause of the People, which, even in time of Revolutions, when the passions of the People themselves were roused, and they were in a great degree united, manifested itself in so remarkable a manner. We may trace the fymptoms of the great political defect here mentioned, in the earliest ages of the Commonwealth. as well as in the last stage of its duration. Rome, while small and poor, it rendered vain whatever rights or power the People possessed, and blafted all their endeavours to defend their liberty, in the fame manner as, in the more splendid ages of the Commonwealth, it rendered the most falutary regulations utterly fruitless, and even instrumental to the ambition and avarice of a few. The prodigious fortune of the Republic,

in short, did not create the disorder, it only gave full scope to it.

But if we turn our view towards the History of the English Nation, we shall see how, from a Government in which the above defects did not exift, different consequences have followed:how cordially all ranks of Men have always united together to lay under proper restraints this Executive power, which they knew could never be their own. In times of public Revolutions, the greatest care, as we have before observed, was taken to ascertain the limits of that Power; and after peace had been restored to the State. those who remained at the head of the Nation, continued to manifest an unwearied jealousy in maintaining those advantages which the united efforts of all had obtained.

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Thus was it made one of the Articles of Magna Charta, that the Executive Power should not touch the person of the Subject, but in confequence of a judgment paffed upon him by his Peers; and so great was afterwards the general union in maintaining this law, that the Trial by Jury, that admirable mode of proceeding which fo effectually fecures the Subject against all the attempts of Power, even (which feemed fo difficult to obtain) against fuch as might be made under the fanction of the Judicial authority, hath both.

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been preserved to this day. It has even been preserved in all its original purity, though the same has been successively suffered to decay, and then to be lost, in the other Countries of Europe, where it had been formerly known. Nay, though this privilege of being tried by one's Peer's, was at first a privilege of Conquerors and Masters, exclusively appropriated to those parts of Nations which had originally invaded and seduced the rest by arms, it has in England been successively extended to every Order of the People.

\* The Trial by Jury was in use among the Normans long before they came over to England; but it is now utterly loft in that Province: it even began very early to degenerate there from its first institution; we see in Hale's History of the Common Law of England, that the unanimity among Jurymen was not required in Normandy for making a verdict a good verdict: but when Jurymen dissented, a number of them was taken out, and others added in their stead, till an unanimity was procured.-In Sweden, where, according to the opinion of the Learned in that Country, the Trial by Tury had its first origin, only some forms of that Institution are now preserved in the lower Courts in the Country, where fets of Jurymen are established for life, and have a falary accordingly. See Robertson's State of Sweden .- And in Scotland the vicinity of England has not been able to preferve to the Trial by Jury its genuine ancient form: the unanimity among Jurymen is not required, as I have been told, to form a verdict; but the majority is decifive.

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And not only the Person, but also the property, of the individual has been fecured against all arbitrary attempts from the Executive power, and the latter has been fuccessively restrained from touching any part of the property of the Subject, even under the pretence of the necessities of the State, any otherwise than by the free grant of the Representatives of the People. Nay, fo true and persevering has been the zeal of these Representatives, in afferting on that account the interests of the Nation, from which they could not feparate their own, that this privilege of taxing themfelves, which was in the beginning grounded on a most precarious tenure, and only a mode of governing adopted by the Sovereign for the fake of his own convenience, has become, in time, a fettled right of the People, which the Sovereign has found it at length necessarily, folemnly, and repeatedly to acknowledge.

Nay more, the Representatives of the People have applied this right of Taxation to a still nobler use than the mere preservation of property; they have, in process of time, succeeded in converting it into a regular and constitutional means of influencing the motions of the Executive Power. By means of this Right, they have gained the advantage of being constantly called to concur in the measures of the Sovereign,—of having

the greatest attention shewn by him to their requests, as well as the highest regard paid to any engagements that he enters into with them. Thus has it become at last the peculiar happiness of English Subjects, to whatever other People either ancient or modern we compare them, to enjoy a share in the Government of their Country, by electing Representatives, who by reason of the peculiar circumstances in which they are placed, and of the extensive rights they possess, are both willing faithfully to serve those who have appointed them, and able to do so.

And indeed the Commons have not rested satissized with establishing once for all, the provisions for the liberty of the People which have been just mentioned; they have afterwards made the preservation of them the first object of their care \*, and taken every opportunity of giving them new vigour and life.

Thus, under Charles the First, when attacks of a most alarming nature were made on the privilege of the People to grant free supplies to the Crown, the Commons vindicated without loss

The first operation of the Commons, at the beginning of a Session, is to appoint four grand Committees. The one is a Committee of Religion, another of Courts of Justice, another of Trade, and another of Grievances: they are to be standing Committees during the whole Session.

of time, that great right of the Nation, which is the Constitutional bulwark of all others, and haftened to oppugn in their beginning, every precedent of a practice that must in the end have produced the ruin of public liberty.

They even extended their care to abuses of every kind. The judicial authority, for instance, which the Executive Power had imperceptibly affumed to itself, both with respect to the person and property of the individval, was abrogated by the Act which abolished the Court of Star Chamber: and the Crown was thus brought back to its true Constitutional office, viz. the countenancing. and supporting with its strength, the execution of the Laws.

The fubfequent endeavours of the Legislature have carried even to a still greater extent the above privileges of the People. They have moreover succeeded in restraining the Crown from any attempt to feize and confine, even for the shortest time, the person of the Subject, unless it be in the cases ascertained by the Law, of which the Judges of it are to decide.

Nor has this extensive unexampled freedom at the expence of the Executive Power, been made, as we might be inclinable to think, the exclusive appropriated privilege of the great and powerful. It is to be enjoyed alike by all ranks of Subjects.

Nay, it was the injury done to a common Citizen that gave existence to the Act which has completed the security of this interesting branch of public liberty.—The oppression of an obscure individual, says Judge Blackstone, gave rise to the famous Habeas Corpus Act: Junius has quoted this observation of the Judge; and the same is well worth repeating a third time, for the just idea it conveys of that readiness of all Orders of Men, to unite in desence of common liberty, which is a characteristic circumstance in the English Government.

And this general union in favour of public liberty, has not been confined to the framing of laws for its fecurity: it has operated with no less vigour in bringing to punishment such as have ventured to infringe them; and the Sovereign has constantly found it necessary to give up the violators of those laws, even when his own Servants, to the Justice of their Country.

Thus we find, so early as the reign of Edward

\* The individual here alluded to was one Francis Jenks, who having made a motion at Guildhall, in the year 1676, to petition the King for a new Parliament, was examined before the Privy Council, and afterwards committed to the Gate-house, where he was kept about two months, through the delays made by the several Judges to whom he applied, in granting him a Habeas Corpus.—See the State Trial, vol. vii. anno 1676.

the First, Judges who were convicted of having committed exactions in the exercise of their offices, to have been condemned by a sentence of Parliament. From the immense sines which were laid upon them, and which it seems they were in a condition to pay, we may indeed conclude that, in those early ages of the Constitution, the remedy was applied rather late to the disorder; but yet it was at last applied.

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Under Richard the Second, examples of the fame kind were renewed. Michael de la Pole, Earl of Suffolk, who had been Lord Chancellor of the kingdom, the Duke of Ireland, and the Archbishop of York, having abused their power by carrying on designs that were subversive of public liberty, were declared guilty of High-treason; and a number of Judges who, in their judicial capacity, had acted as their instruments, were involved in the same condemnation †.

Under

<sup>•</sup> Sir Ralph de Hengham, Chief Justice of the King's-Bench, was fined 7000 marks; Sir Thomas Wayland, Chief Justice of the Common Pleas, had his whole estate forfeited; and Sir Adam de Stratton, Chief Baron of the Exchequer, was fined 3400 marks.

<sup>†</sup> The most conspicuous among these Judges were Sir Robert Belknap, and Sir Robert Tresilian, Chief Justice of the King's Bench. The latter had drawn up a string of questions

Under the reign of Henry the Eighth; Sir Thomas Empsom, and Edmund Dudley, who had been the promoters of the exactions committed under the preceding reign, fell victims to the zeal of the Commons for vindicating the cause of the People. Under King James the First, Lord Chancellor Bacon experienced that neither his high dignity, nor great personal qualifications, could screen him from having the severest censure passed upon him, for the corrupt practices of which he had suffered himself to become guilty. And under Charles the First, the

calculated to confer a despotic authority on the Crown, or rather on the Ministers above named, who had found means to render themselves entire Masters of the person of the King. These questions Sir Rober Tresilian proposed to the Judges, who had been fummoned for that purpose, and they gave their opinions in favour of them. One of these opinions of the Judges, among others, tended to no less than to annihilate, at one stroke, all the rights of the Commons, by taking from them that important privilege mentioned before, of starting and freely discussing whatever subjects of debate they think proper: the Commons were to be restrained, under pain of being punished as traitors, from proceeding upon any articles besides those limited to them by the King. All those who had a share in the above declarations of the Judges, were attainted of high-treason. Some were hanged; among them was Sir Robert Trefilian; and the others were only banished, at the intercession of the Bishops .- See the Parl. History of England, vol. 1.

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Judges having attempted to imitate the example of the Judges under Richard the Second, by delivering opinions subversive of the rights of the People, found the same spirit of watchfulness in the Commons, as had proved the ruin of the former. Lord Finch, Keeper of the Great Seal, was obliged to sly beyond sea. The Judges Davenport and Crawley were imprisoned: and Judge Berkeley was seized while sitting upon the Bench, as we find in Rushworth.

In the reign of Charles the Second, we again find fresh instances of the vigilance of the Commons. Sir William Scroggs, Lord Chief Justice of the King's Bench, Sir Francis North, Chief Justice of the Common Pleas, Sir Thomas Jones, one of the Judges of the King's Bench, and Sir Richard Weston, one of the Barons of the Exchequer, were impeached by the Commons, for partialities shewn by them in the administration of Justice; and Chief Justice Scroggs, against whom some positive charges were well proved, was removed from his employments.

The feveral examples offered here to the Reader, have been taken from feveral different periods of the English History, in order to shew that neither the influence, nor the dignity, of the infractors of the laws, even when they have been the nearest Servants of the Crown, have ever been

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able to check the zeal of the Commons in afferting the rights of the People. Other examples
might perhaps be related to the fame purpose;
though the whole number of those to be met with,
will, upon enquiry, be found the smaller, in proportion as the danger of infringing the laws has
always been indubitable.

So much regularity has even (from all the circumstances above mentioned) been introduced into the operations of the Executive Power in England,-fuch an exact Justice have the People been accustomed, as a consequence, to expect from that quarter, that even the Sovereign, for his having once fuffered himfelf personally to violate the safety of the Subject, did not escape severe censure. The attack made by order of Charles the Second, on the person of Sir John Coventry, filled the nation with aftonishment; and this violent gratification of private passion, on the part of the Sovereign (a piece of felf-indulgence with regard to inferiors, which whole classes of individuals in certain Countries almost think that they have a right to) excited a general ferment. "This event " (fays Bishop Burnet) put the House of Com-" mons in a furious uproar.... It gave great ad-" vantages to all those who opposed the Court; " and the names of the Court and Country party,

which till now had feemed to be forgotten,
were again revived \*."

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These are the limitations that have been set, in the English Government, on the operations of the Executive Power: limitations to which we find nothing comparable in any other free States, ancient or modern; and which are owing, as we have seen, to that very circumstance which seemed at first sight to prevent the possibility of them, I mean the greatness and unity of that power; the effect of which has been, in the event, to unite upon the same object, the views and efforts of all Orders of the People.

From this circumstance, that is, the unity and peculiar stability of the Executive Power in England, another most advantageous consequence has followed, that has been before noticed, and which it is not improper to mention again here, as this Chapter is intended to confirm the principles laid down in the former ones,—I mean the unremitted continuance of the same general union among all ranks of Men, and the spirit of mutual justice which thereby continues to be diffused through all orders of Subjects.

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Parliament was made on this occasion, for giving a farther extent to the provisions before made for the personal security of the Subject; which is still called the Coventry Act.

Though furrounded by the many boundaries that have just now been described, the Crown, we must observe, has preserved its prerogative undivided: it still possesses its whole effective strength, and is only tied by its own engagements, and the consideration of what it owes to its dearest interests.

The great, or wealthy Men in the Nation, who, affifted by the body of the People, have fucceeded in reducing the exercise of its authority within such well defined limits, can have no expectation that it will continue to confine itself to them any longer than they themselves continue, by the justice of their own conduct, to deserve that support of the People, which alone can make them appear of consequence in the eye of the Sovereign,—no probable hopes that the Crown will continue to observe those laws by which their wealth, dignity, liberty, are protected, any longer than they themselves also continue to observe them.

Nay, more, all those claims of their rights which they continue to make against the Crown, are encouragements which they give to the rest of the People to affert their own rights against them. Their constant opposition to all arbitrary proceedings of that Power, is a continual declaration they make against any acts of oppression which the

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fuperior advantages they enjoy, might entice them to commit on their inferior fellow-fubjects. Nor was that fevere censure, for instance, which they concurred in passing on an unguarded violent action of their Sovereign, only a restraint put on the personal actions of future English Kings; no, it was a much more extensive provision for the securing of public liberty;—it was a solemn engagement entered into by all the powerful Men in the State to the whole body of the People, secupulously to respect the person of the lowest among them.

And indeed the constant tenor of the conduct even of the two Houses of Parliament shews us, that the above observations are not matters of mere speculation. From the earliest times we see the Members of the House of Commons to have been very cautious not to assume any distinction that might alienate from them the affections of the rest of the People \*. Whenever

\* In all cases of public offences, down to a simple breach of the peace, the Members of the House of Commons have no privileges whatever above the rest of the People: they may be committed to prison by any Justice of the Peace; and are dealt with afterwards in the same manner as any other Subjects. With regard to civil matters, their only privilege is to be free from Arrests during the time of a Session, and forty days before, and forty days after; but they may be sued, by process against their goods, for any just debt during that time.

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those privileges which were necessary to them for the discharge of their trust have proved burdensome to the Community, they have retrenched them. And those of their Members who have applied either these privileges, or in general that influence which they derived from their situation, to any oppressive purposes, they themselves have endeavoured to bring to punishment.

Thus, we see, that in the reign of James the First, Sir Giles Mompesson, a Member of the House of Commons, having been guilty of monopolies, and other acts of great oppression on the People, was not only expelled, but impeached and prosecuted with the greatest warmth by the House, and finally condemned by the Lords to be publicly degraded from his rank of a Knight, held for ever an infamous person, and imprisoned during life.

In the same reign, Sir John Bennet, who was also a Member of the House of Commons, having been found to have been guilty of several corrupt practices, in his capacity of Judge of the *Prerogative* Court of Canterbury, such as taking exorbitant sees, and the like, was expelled the House, and prosecuted for these offences.

In the year 1641, Mr. Henry Benson, Member for Knaresborough, having been detected in selling protections, experienced likewise the indignation of the House, and was expelled.

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In fine, in order at it were to make it completely notorious, that neither the condition of Representative of the People, nor even any degree of influence in their House, could excuse any one of them from strictly observing the rules of Justice, the Commons did on one occasion pass the most severe censure they had power to inslict. upon their Speaker himfelf, for having, in a fingle instance, attempted to convert the discharge of his duty as Speaker into a means of private emolument. - Sir John Trevor, Speaker of the House of Commons, having, in the fixth year of the reign of King William, received a thousand guineas from the City of London, " as a gratuity " for the trouble he had taken with regard to the " paffing of the Orphan Bill," was voted guilty of a High crime and misdemeanor, and expelled the House. Even the inconsiderale sum of twenty guineas which Mr. Hungerford, another Member, had been weak enough to accept on the fame score, was looked upon as deserving the notice of the House; and he was likewise expelled \*.

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<sup>\*</sup> Other examples of the attention of the House of Commons to the conduct of their Members, might be produced either before, or after, that which is mentioned here. The reader may, for instance, see the relation of their proceedings in the affair of the South Sea Company Scheme; and a few years

If we turn our view towards the House of Lords, we shall find that they have also constantly taken care that their peculiar privileges should not prove impediments to the common justice which is due to the rest of the People \*. They have constantly agreed to every just proposal that has been made to them on that subject by the Commons: and indeed, if we confider the numerous and oppressive privileges claimed by the Nobles in most other Countries, and the vehement spirit with which they are commonly afferted, we shall think it no small praise to the body of the Nobility in England (and also to the nature of that Government of which they make a part) that it has been by their free confent that their privileges have been confined to what they now are; that is to fay, to no more, in general, than what is necessary to the accomplishment of the end and constitutional design of that House.

after, in that of the Charitable Corporation; a fraudulent feheme particularly opprefive to the poor, for which several Members were expelled.

\* In case of a public offence, or even a simple breach of the peace, a Peer may be committed till he sinds bail, by any Justice of the Peace: and Peers are to be tried by the common course of law, for all offences under selony. With regard to civil matters, they are at all times free from arrests; but execution may be had against their effects, in the same manner against those of other Subjects. d

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In the exercise of their Judicial authority with regard to the civil matters, the Lords have manifested a spirit of equity nowise inserior to that which they have shown in their Legislative capacity. They have, in the discharge of that function, (which of all others is so liable to create temptations) shewn an uncorruptness really superior to what any judicial Assembly in any other Nation can boast. Nor do I think that I run any risk of being contradicted, when I say that the conduct of the House of Lords, in their civil judicial capacity, has constantly been such as has kept them above the reach of even suspicion or slander.

Even that privilege which they enjoy, of exclusively trying their own Members, in case of any accusation that may affect their life (a privilege which we might at first sight think repugnant to the idea of a regular Government, and even alarming to the rest of the People) has constantly been made use of by the Lords to do justice to their fellow-subjects; and if we cast our eyes either on the collection of the State Trials, or on the History of England, we shall find very sew examples, if any, of a Peer, really guilty of the offence laid to his charge, that has derived any advantage from his not being tried by a Jury of Commoners.

Nor has this just and moderate conduct of the

two Houses of Parliament in the exercise of their powers (a moderation so unlike what has been related of the conduct of the powerful Men in the Roman Republic) been the only happy consequence of that salutary jealously which those two Bodies entertain of the power of the Crown. The same motive has also engaged them to exert their utmost endeavours to put the Courts of Justice under proper restraints: a point of the highest importance to public liberty.

They have, from the earliest times, preferred complaints against the influence of the Crown over these Courts, and at last procured Laws to be enacted by which fuch influence has been intirely prevented: all which measures, we must observe, were at the same time strong declarations that no Subjects, however exalted their rank might be, were to think themselves exempt from fubmitting to the uniform course of the Law, or hope to influence or over-awe it. The fevere examples which they have united to make on those Judges who had rendered themselves the instruments of the passions of the Sovereign, or of the defigns of the Ministers of the Crown, are also awful warnings to the Judges who have succeeded them, never to attempt to deviate in favour of any, the most powerful individuals, from that strait line of Justice which the joint

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joint Wisdom of the Legislature has once marked out to them.

This fingular fituation of the English Judge relatively to the three Constituent Powers of the State, (and also the formidable support which they are certain to receive from them as long as they continue to be the faithful Ministers of Justice) has at last created such an impartiality in the distribution of public Justice in England, has introduced into the Courts of Law the practice of fuch a thorough difregard of either the influence or wealth of the contending Parties, and procured to every individual, both fuch an easy access to these Courts, and such a certainty of redrefs, as are not to be paralleled in any other Government.-Philip de Comines, fo long as three hundred years ago, commended in strong terms the exactness with which Justice is done in England to all ranks of Subjects \*; and the impartiality with which the fame is administered in these days, will with still more reason create the furprize of every Stranger who has an opportunity of observing the customs of this Country t.

Indeed

<sup>\*</sup> See page 34 of this Work.

<sup>+</sup> A little after I came to England for the first time (if the Reader will give me leave to make mention of myself in this case) an action was brought in a Court of Justice

Indeed to such a degree of impartiality has the administration of public Justice been brought in England, that it is saying nothing beyond the exact truth, to affirm that any violation of the laws, though perpetrated by Men of the most extensive influence, nay, though committed by the special direction of the very first Servants of the Crown, will be publicly and completely redressed. And the very lowest of Subjects will obtain such redress, if he has but spirit enough to

against a Prince very nearly related to the Crown; and a Noble Lord was also, much about that time, engaged in a law-fuit for the property of some valuable lead mines in Yorkshire. I could not but observe that in both these cases a decision was given against the two most powerful parties; though I wondered but little at this, because I had before heard much of the impartiality of the law proceedings in England, and was prepared to see instances of that kind. But what I was much furprized at, was that no body appeared to be in the least so, not even at the strictness with which the ordinary course of the law had, particularly in the former case, been adhered to,-and that those proceedings which I was disposed to consider as great instances of justice, to the production of which some circumstances peculiar to the times, at least some uncommon virtue of spirit on the part of the Judges, must have more or less co-operated, were looked upon by all those whom I heard speak about it, as being nothing more than the common and expected course of things. This circumstance became a strong inducement to me to enquire into the nature of a Government by which such effects were produced.

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fland forth, and appeal to the laws of his Country.-Most extraordinary circumstances these! which those who know the difficulty that there is in eftablishing just laws among Mankind, and in providing afterwards for their due execution. only find credible because they are matters of fact, and can begin to account for, only when they look up to the constitution of the Government itself; that is to fay, when they consider the circumstances in which the Executive Power, or the Crown, is placed in relation to the two Bodies that concur with it to form the Legislature,-the circumstances in which those two Assemblies are placed in relation to the Crown, and to each other, and the fituation in which all the Three find themselves with respect to the whole Body of the People \*.

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The affertion above made with respect to the impartiality with which Justice is, in all cases, administered in England, not being of a nature to be proved by alledging single facts, I have entered into no particulars on that account. However, I have subjoined here two cases, which, I think, cannot but appear remarkable to the Reader.

The first is the case of the prosecution commenced in the year 1763, by some Journeymen Printers, against the King's Messengers, for apprehending and imprisoning them for a short time, by virtue of a General Warrant from the Secretaries of State; and that which was afterwards carried on by another private individual against one of the Se-

cretaries

In fine, a very remarkable circumstance in the English Government (and which alone evinces some-

cretaries themselves. - In these actions, all the ordinary forms of proceeding used in cases of actions between private Subjects, were strictly adhered to; and both the Secretary of State, and the Messengers, were, in the end, condemned. Yet, which is proper the Reader should observe, from all the circumstances that accompanied this affair, it is difficult to propose a case in which Ministers could, of themfelves, be under greater temptations to exert an undue influence to hinder the ordinary course of Justice. Nor were the acts for which those Ministers were condemned, Acts of evident oppression, which nobody could be found to justify. They had done nothing but follow a practice of which they found several precedents established in their Offices; and their case, if I am well informed, was such that most individuals, under fimilar circumstances, would have thought themselves authorised to have acted as they had done.

The second case I propose to relate, affords a singular instance of the considence with which all Subjects in England
claim what they think their just rights, and of the certainty
with which the remedies of the law are in all cases open to
them. The fact I mean, is the Arrest executed in the reign
of Queen Anne, in the year 1708, on the person of the
Russian Ambassador, by taking him out of his Coach for the
sum of sifty pounds—And the consequences that followed this
fact are still more remarkable. The czar highly resented
this affront, and demanded that the Sherist of Middlesex,
and all others concerned in the Arrest, should be punished
with instant death. "But the Queen," to the amazement of that despotic Court, says Justice Blackstone, from
whom I borrow this sact) "directed the Secretary of
State

fomething peculiar and excellent in its Nature), is that spirit of extreme mildness with which Justice, in criminal cases, is administered in England; a point with regard to which England differs from all other Countries in the World.

When we consider the punishments in use in the other States in Europe, we wonder how Men can be brought to treat their fellow-creatures with fo much cruelty; and the bare confideration of those punishments would fufficiently convince us (supposing we did not know the fact from other circumstanes) that the Men in those States who frame the laws, and preside over their execution, have little apprehension that either they, or their friends, will ever fall victims to those laws which they thus rashly establish.

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In the Roman Republic, circumstances of the same nature with those just mentioned, were

<sup>&</sup>quot; State to inform him that she could inslict no punishment " upon any, the meanest of Her Subjects, unless warranted " by the law of the land."-An Act was afterwards paffed to free from arrells the persons of foreign Ministers, and fuch of their fervants as they have delivered a lift of, to the

Secretary of State. A copy of this Act elegantly engroffed and illuminated, continues Judge Blackstone, was fent to Moscow, and an Ambassador extraordinary commissioned to deliver it.

also productive of the greatest desects in the kind of criminal Justice which took place in it. That class of Citizens who were at the head of the Republic, and who knew how mutually to exempt each other from the operation of any too severe laws or practice, not only allowed themselves great liberties, as we have seen, in disposing of the lives of the inferior Citizens, but, had also introduced into the exercise of the illegal powers they assumed to themselves in that respect, a great degree of cruelty.

Nor were things more happily conducted in the Grecian Republics. From their Democratical nature, and the frequent Revolutions to which they were subject, we naturally expect to see that authority to have been used with mildness, which those who enjoyed it must have known to have been but precarious; yet, such were the effects of the violence attending those very Revolutions, that a spirit both of great irregularity and cruelty had taken place among

• The common manner in which the Senate ordered Citizens to be put to death, was by throwing them head-long from the top of the Tarpeian Rock. The Confuls, or other particular Magistrates, fometimes caused Citizens to expire upon a cross; or which was a much more common case, ordered them to be beaten to death, with their heads sastened between the two branches of a fork: which they called cervicem furcae inferere.

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the Greeks, in the exercise of the power of inflicting punishments. The very harsh laws of Draco are well known, of which it was said that they were not written with ink, but with blood. The severe laws of the Twelve Tables among the Romans, were in great part brought over from Greece. And it was an opinion commonly received in Rome, that the cruelties practised by the Magistrates on the Citizens, were only imitations of the examples which the Greeks had given them \*.

In fine, the use of Torture, that method of administering Justice in which folly may be said to be added to cruelty, had been adopted by the Greeks in consequence of the same causes which had concurred to produce the irregularity of their criminal Justice. And the same practice continues, in these days, to prevail on the continent of Europe, in consequence of that general arrangement of things which creates there such a carelessness about remedying the abuses of public Authority.

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<sup>\*</sup> Cæsar expressly reproaches the Greeks with this fact in his speech in favour of the accomplices of Cataline, which Sallust has transmitted to us—Sed eodum illo tempore, Graciae morim imitati, (Majores nostri) verberibus animad vertebant in civeis; de condemnatis ultimum supplicium sumptum.

But the nature of that same Government which has procured to the People of England all the advantages we have before described, has, with still more reason, freed them from the most oppressive abuses, which prevail in other countries.

That wantonness in disposing of the dearest rights of mankind, those infults upon human Nature, of which the frame of the Governments established in other States, unavoidably becomes more or less productive, are entirely banished from a Nation which has the happiness of having its interests taken care of by Men who continue to be themselves exposed to the pressure of those laws which they concur in making, and of every tyrannic practice which they fuffer to be introduced,-by Men whom the advantages which they possess above the rest of the People, render only more exposed to the abuses they are appointed to prevent, only more alive to the dangers against which it is their duty to defend the Community .

Hence

<sup>•</sup> Historians take notice that the Commons, in the reign of Charles II. made haste to procure the abolition of the old Statute, De Haretico comburendo, (For burning Heretics) as soon as it became to be publicly known that the prefumptive Heir to the Crown was a Roman Catholic. Perhaps they would not have been so diligent and earnest, if they nad not been fully convinced that a Member of the House

Hence we see that the use of Torture has, from the earliest times, been utterly unknown in England. And all attempts to introduce it, whatever might be the power of those who made them, or the circumstances in which they renewed their endeavours, have been strenuously opposed and deseated \*.

From the same cause also arose that remarkable forbearance of the English Laws, to use any cruel severity in the punishments which experience shewed it was necessary for the preservation of Society to establish; and the utmost vengeance of those laws, even against the most enormous Offenders, never extends beyond the simple deprivation of life †.

Nay,

House of Commons, or his friends, may be brought to trial as easily as any other individuals among the people, so long as an express and written law may be produced against them.

\* The Reader may on this subject see again the Note in page 177 of this Work, where the opposition is mentioned, that was made to the Earl of Susfolk, and the Duke of Exeter, when they attempted to introduce the practice of Torture; this even was one of the causes for which the latter was afterwards impeached—The reader is also referred to the Note following that which has just been quoted, in which the solemn declaration is related, that was given by the Judges against the practice of Torture, in the case of Felton, who had assassing the Duke of Buckingham.

† A very fingular instance occurs in the History of the

Nay, so anxious has the English Legislature been to establish mercy, even to convicted Offenders, as a fundamental principle of Government of England, that they made it an express article of that great public Compact which was framed at the important æra of the Revolution, that "no cruel and unusual punishments should be used "."—They even endeavoured, by adding a clause for that purpose to the Oath which Kings were thenceforward to take at their Coronation, as it were to render it an everlasting obligation of English Kings, to make Justice to be executed with mercy †."

CHAP.

year 1605, of the care of the English Legislature not to fusfer precedents of cruel practices to be introduced. During the time that those concerned in the Gun-powder plot were under sentence of death, a motion was made in the House of Commons to petition the King, that the execution might be staid, in order to consider of some extraordinary punishment to be inslicted upon them: but this motion was rejected. A proposal of the same kind was also made in the House of Lords, where it was dropped—See the Parliamentary History of England, vol. v. anno 1605.

• See the Bill of Rights, Art. x.—" Excessive bail oughs not to be required, nor excessive sines imposed; nor cruel and anusual punishments inflicted."

† Those same dispositions of the English Legislature, which have led them to take such precautions in favour even of convicted offenders, have still more engaged them to make pro-

# Crown. Elence the engine care with which CHAP. XVII.

A more inward view of the English Government than bas bitberto been offered to the Reader in the course of this Work .- Very essential differences between the English Monarchy, as a Monarchy, and all those with which we are acquainted.

THE Doctrine constantly maintained in this Work, and which has, I think, been fufficiently supported by facts and comparisons drawn from the History of other Countries, is that the remakable liberty enjoyed by the English Nation, is effentially owing to the impossibility under which their Leaders, or in general all Men of power among them, are placed, of invading and transferring to themselves any branch of the Governing Executive authority; which authority is exclusively vested, and firmly secured, in the

provisions in favour of such persons as are only suspected and accused of having committed offences of any kind. Hence the zeal with which they have availed themselves of every important occasion, such for instance as that of the Revolution, to procure new confirmations to be given to the institution of the Trial by Jury, to the laws on imprisonments, and in general to that system of criminal Jurisprudence of which a description has been given in the first part of this Work, to which I refer the Reader.

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Crown.

Crown. Hence the anxious care with which those Men continue to watch the exercise of that authority. Hence their perseverance in observing every kind of engagement which themselves may have entered into with the rest of the People.

But here a confideration of a most important kind presents itself.—How comes the Crown in England, thus constantly to preserve to itself (as we see it does) the Executive authority in the State, and moreover to preserve it so completely as to inspire the great Men in the Nation with that conduct so advantageous to public Liberty, which has just been mentioned? All these are effects which we do not find, upon examination, that the power of *Crowns* has hitherto been able to produce in other Countries,

In all States of a Monarchical form, we indeed fee that those Men whom their rank and wealth, or their personal power of any kind, have raised above the rest of the People, have formed combinations among themselves to oppose the power of the Monarch. But their views, we must observe in forming these combinations, were not by any means to set general and impartial limitations on the Sovereign authority. They endeavoured to render themselves entirely independent of that authority; or even utterly to annihilate it, according to circumstances.

Thus we see that in all the States of ancient Greece, the Kings were at last destroyed and exterminated. The same even happened in Italy, where in remote times there existed for a while several kingdoms, as we learn both from the ancient Historians and the Poets. And in Rome, we even know the manner and circumstances in which such a revolution was brought about.

In more modern times, we see the numerous Monarchical Sovereignties which had been raised in Italy on the ruins of the Roman Empire, to have been successively destroyed by powerful faction; and events of much the same nature have at different times taken place in the Kingdoms established in the other parts of Europe.

In Sweden, Denmark, and Poland, for instance, we find that the *Nobles* have commonly reduced their Sovereigns to the condition of simple Presidents over their assemblies,—of mere oftensible Heads of the Government.

In Germany and in France, Countries where the Monarchs being possessed of considerable demesnes, were better able to maintain their independence than the Princes just mentioned, the Nobles waged war against them, sometimes singly and sometimes jointly; and events similar to these have successively happened in Scotland, Spain, and the modern Kingdoms of Italy. In fine, it has only been the means of standing armed forces that the Sovereigns of most of the Kingdoms we have mentioned, have been able in a course of time to affert the prerogatives of their Crown. And it is only by continuing to keep up such forces, that, like the Eastern Monarchs, and indeed like all the Monarchs that ever existed, they continue to be able to support their authority.

How therefore can the Crown of England, without the affiftance of any armed force, maintain, as it does, its numerous prerogatives? How can it, under fuch circumstances, preserve to itself the whole Executive power in the State? For here we must observe, the Crown in England does not derive any support from what regular forces it has at its disposal; and if we doubted this fact, we need only look to the astonishing sub-ordination in which the military is kept to the civil power, to become convinced that an English King is not indebted to his army for the preservation of his authority.

If we could suppose that the armies of the Kings of Spain or of France, for instance, were, through some very extraordinary circumstance, all to vanish in one night, the power of those Sove-

Henry VIII. the most absolute Prince, perhaps, who ever fat upon a Throne, kept no standing army.

reigns, we must not doubt, would, ere six months, be reduced to a mere shadow. They would immediately behold their prerogatives, however formidable they may be at present, invaded and dismembered \*: and supposing that regular Governments continued to exist, they would be reduced to have little more influence in them than the Doges of Venice, or of Genoa, possess in the Governments of those Republics †.

How, therefore, to repeat the question once more, which is one of the most interesting that can occur in politics, how can the Crown in England, without the affistance of any armed force, avoid those dangers to which all other Sovereigns are exposed?

How can it, without any fuch force, accomplish even incomparably greater works than those Sovereigns, with their powerful armies, are, we find, in a condition to perform?—How can it bear that universal effort (unknown in other Monarchies) which, we have seen, is continually and openly exerted against it? How can it even continue to resist it so powerfully as to preclude all

<sup>\*</sup> As was the case in the several Kingdoms into which the Spanish Monarchy was formerly divided; and, in not very remote times, in France itself.

<sup>+</sup> Or than the Kings of Sweden were allowed to enjoy, before the last Revolution in that Country.

individuals whatever, from ever entertaining any views besides those of setting just and general limitations to the exercise of its authority? How can it ensorce the laws upon all Subjects, indiscriminately, without injury or danger to itself? How can it, in fine, impress the minds of all the great Men in the States with so lasting a jealously of its power, as to necessitate them, even in the exercise of their undoubted rights and privileges, to continue to court and deserve the affection of the rest of the People?

Those great Men, I shall answer, who even in quiet times prove so formidable to other Monarchs, are in England divided into two Assemblies; and such, it is necessary to add, are the principles upon which this division is made, that from it results, as a necessary consequence, the solidity and indivisibility of the power of the Crown \*.

The Reader may perceive that I have led him, in the course of this Work, much beyond the line, within which Writers on the subject of Government have confined themselves, or rather, that I have followed a tract entirely different from that which those Writers have pursued. But as the

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<sup>\*</sup> I have not flattered myself, in writing this Chapter that it would be perfectly understood, nor is it designed for the generality of readers.

observation just made on the stability of the power of the Crown in England, and the cause of it, is new in its kind, fo do the principles from which its truth is to be demonstrated, totally differ from what is commonly looked upon as the foundation of the science of Politics. To lay these principles here before the Reader, in a manner completely fatisfactory to him, would lead us into philosophical discussions on what really constitutes the basis of Governments and Power amongst Mankind, both extremely long, and in a great measure foreign to the fubject of this book. I shall therefore content myfelf with proving the above observations by facts; which is more, after all, than political Writers usually undertake to do with regard to their speculations.

As I chiefly proposed to show how the extensive liberty the English enjoy, is the result of the peculiar frame of their Government, and occasionally to compare the same with the Republican form, I even had at first intended to confine myself to that circumstance, which both constitutes the assential difference between those two forms of Government, and is the immediate cause of English liberty; I mean the having placed all the executive authority in the State out of the hands of those in whom the People trust. With regard to the remote cause of that same liberty, that is to say the stability of the power of the

Crown,

Crown, this fingular folidity without the affiftance of any armed force, by which this executive authority is fo fecured, I should perhaps have been silent, had I not found it absolutely necessary to mention the fact in this place, in order to obviate the objections which the more reslecting part of Readers might otherwise have made, both to several of the observations before offered to them, and to a few others which are soon to follow.

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Besides, I shall confess here, I have been several times under apprehensions, in the course of this Work, left the generality of Readers, missed by the fimilarity of names, should put too extenfive a construction upon what I said with regard to the usefulness of the power of the Crown in England; -left they should think, for instance, that I attribute the fuperior advantages of the English mode of Government over the Republican form, merely to its approaching nearer to the nature of the Monarchies established in the other parts of Europe, and that I looked upon every kind of Monarchy, as being in itself preferable to a Republican Government: an opinion, which I do not by any means or in any degree entertain; I have too much affection, or if you please, prepossession, in favour of that form of Government under which I was born; and as I am

bills.

fensible of its defects, so do I know how to set a value upon the advantages by which it compensates for them.

I therefore have, as it were, made hafte to avail myself of the first opportunity of explaining my meaning on this subject,—of indicating that the power of the Crown in England stands upon soundations entirely different from those on which the same Power rests in other Countries,—and of engaging the Reader to observe (which for the present will suffice) that as the English Monarchy differs, in its nature and main soundations, from every other, so all that is said here of its advantages is peculiar and confined to it.

But, to come to the proofs (derived from facts) of the folidity accruing to the power of the Crown in England, from the co-existence of the two Assemblies which concur to form the English Parliament, I shall first point out to the Reader several open acts of these two Houses, by which they have by turns effectually deseated the attacks of each other upon its prerogative.

Without looking farther back for examples than the reign of Charles the Second, we fee that the House of Commons had, in that reign, begun to adopt the method of adding (or tacking, as it is commonly expressed) such bills as they wanted more particularly to have passed, to their money

bills. This forcible use they made of their undoubted privilege of granting money, if suffered to have grown into common practice, would have totally destroyed the æquilibrium that ought to subsist between them and the Crown. But the Lords took upon themselves the task of maintaining that æquilibrium: they complained with great warmth of the several precedents that were made by the Commons, of the practice we mention: they insisted that Bills should be framed " in the " old and decent way of Parliament;" and at last have made it a standing order of their House, to reject upon the sight of them, all bills that are tacked to money bills.

Again, about the thirty-first year of the same reign, a strong party prevailed in the House of Commons; and their efforts were not entirely confined, if we may credit the Historians of those times, to serving their Constituents faithfully, and providing for the welfare of the State. Among other bills which they proposed in their House, they carried one to exclude from the Crown the immediate Heir to it; an affair this, of a very high nature, and with regard to which it may well be questioned whether the legislative Assemblies have a right to form a resolution, without the express and declared concurrence of the body of the People. But both the Crown and the Nation

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were delivered from the danger of establishing fuch a precedent, by the interposition of the Lords, who threw out the bill on the first reading.

In the reign of King William the Third, a few years after the Revolution, attacks were made upon the Crown from another quarter. A strong party was formed in the House of Lords; and, as we may see in Bishop Burnet's History of his Own Times, they entertained very deep designs. One of their views, among others, was to abridge the prerogative of the Crown of calling Parliaments, and judging of the proper times of doing it \*. They accordingly framed and carried in their House a bill for ascertaining the sitting of Parliament every year: but the bill, after it had passed in their House, was rejected by the Commons †.

\* They, besides, proposed to have all money bills stopped in their House, till they had procured the right of taxing, themselves, their own estates; and have a Committee of Lords, and a certain number of the Commons, appointed to confer together concerning the State of the Nation; "which "Committee (says Bishop Burnet) would soon have grown to have been a Council of State, that would have brought

<sup>&</sup>quot; all affairs under their inspection, and never had been pro-

or posed but when the Nation was ready to break into civil wars."—See Burnet's History, anno 1693.

<sup>†</sup> Nov. 28, 1693.

Again, we find, a little after the accession of King George the First, an attempt was also made. by a party in the House of Lords, to wrest from the Crown a prerogative which is one of its finest flowers; and is, besides, the only check it has on the dangerous views which that House (which may stop both money bills and all other bills) might be brought to entertain; I mean the right of adding new members to it, and judging of the times when it may be necessary to do fo. A bill was accordingly presented, and carried, in the House of Lords, for limiting the members of that House to a fixed number, beyond which it should not be increased; but after great pains taken to infure the fuccess of this bill, it was at last rejected by the House of Commons.

In fine, the feveral attempts which a majority in the House of Commons have in their turn made to restrain, farther than it now is, the influence of the Crown arising from the distribution of preserments and other advantages, have been checked by the House of Lords; and all placebills have, from the beginning of this Century, constantly miscarried in that House.

Nor have these two powerful Assemblies only succeeded in thus warding off the open attacks of each other, on the power of the Crown. Their co-existence, and the principles upon which they

they are feverally framed, have been productive of another effect much more extensive, though at first less attended to, I mean the preventing even the making of such attacks; and in times too, when the Crown was of itself incapable of defending its authority: the views of each of these two Houses, destroying, upon these occasions, the opposite views of the other, like those positive and negative equal quantities (if I may be allowed the comparison) which destroy each other on the opposite sides of an equation.

Of this we have several remarkable examples; as for instance, when the Sovereign has been a minor. If we examine the History of other Nations, especially before the invention of standing armies, we shall find that the event we mentioned never failed to be attended with open invasions of the Royal authority, or even sometimes with complete and settled divisions of it. In England, on the contrary, whether we look at the reign of Richard II. or that of Henry VI. or of Edward VI. we shall see that the Royal authority has been quietly exercised by the Councils that were appointed to affift those Princes; and when they came of age, the same has been delivered over to them undiminished.

But nothing so remarkable can be alledged on this subject, as the manner in which these two

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Houses have acted upon those occasions when the Crown being without any present possessor, they had it in their power, both to fettle it on what Person they pleased, and to divide and distribute its effectual prerogatives, in what manner, and to what fet of Men, they might think proper. Circumstances like those we mention, have never failed in other Kingdoms, to bring on a division of the effectual authority of the Crown, or even of the State itself. In Sweden, for instance (to fpeak of that kingdom which has borne the greatest outward resemblance to that of England). when Queen Christina was put under a necessity of abdicating the Crown, and it was transferred to the Prince who stood next to her in the line of Succession, the Executive authority in the State is immediately divided, and either distributed among the Nobles, or affigned to the Senate, into which the Nobles alone could be admitted: and the new King was only to be a President over it.

After the death of Charles the Twelfth, who died without male heirs, the disposal of the Crown (the power of which Charles the Eleventh had found means to render again absolute) returned to the States, and was settled on the Princess Ulrica, and the Prince her husband. But the Senate, at the same time it thus settled the pos-

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fession of the Crown, again assumed to itself the effectual authority which had formerly belonged to it. The privilege of affembling the States was vested in that Body. They also secured to themfelves the power of making war and peace, and treaties with foreign powers,—the disposal of places,-the command of the army and of the fleet, - and the administration of the public reve-Their number was to confift of fixteen Members. The majority of votes was to be decifive upon every occasion. The only privilege of the new King, was to have his vote reckoned for two: and if at any time he should refuse to attend their meetings, the business was nevertheless to be done as effectually and definitively without him \*.

But

\* The Senate had procured a Seal to be made, to be affixed to their official resolutions, in case the King should refuse to lend his own. The reader will find a few more particulars concerning the former government of Sweden, in the nineteenth Chapter.

Regulations of a fimilar nature had been made in Denmark, and continued to subsist, with some variations, till the Revolution which, in the last Century, placed the whole power in the State in the hands of the Crown, without controul. The different Kingdoms into which Spain was formerly divided, were governed in much the same manner.

And in Scotland, that Seat of anarchy and aristocratical feuds, all the great offices in the State were not only taken

But in England, the revolution of the year 1689 was terminated in a manner totally diffe-

from the Crown; but they were moreover made heditary in the principal families of the Body of the Nobles:—fuch were the offices of High Admiral, High Stewart, High Confable, Great Chamberlain, and Justice General; this latter office implied powers analogous to those of the Lord Chancellor, and the Lord Chief Justice of the King's Bench, united.

The King's minority, or personal weakness, or in general the difficulties in which the State might be involved, were circumstances of which the Scotch Leaders never sailed to avail themselves for invading the governing authority; a remarkable instance of the claims they were used to set forth on those occasions, occurs in a Bill that was framed in the year 1703, for settling the Succession to the Crown, after the demise of the Queen, under the title of An AA for the Security of the Kingdom.

The Scotch Parliament was to fet by its own authority every year, on the first day of November, and adjourn themfelves as they should think proper.

The king was to give his affent to all laws agreed to, and offered by, the Estates; or commission proper officers for doing the same.

A Committee of one and thirty Members, chosen by the Parliament, were to be called the King's Council, and govern during the recess, being accountable to the Parliament.

The King not to make any foreign Treaty without the confent of Parliament.

All places and offices, both civil and military, and all penfions formerly given by the King, shall ever after be given by Parliament. See Parliamentary Debates. A. 1703.

rent.

Those who at that interesting epoch had the guardianship of the Crown, -those in whose hands it lay vacant, did not manifest so much as a thought to fplit and parcel out its prerogative. They tendered it to a fingle indivisible possessor, impelled as it were by fome fecret power that was unfeen, operating upon them without any falvo, without any article to establish the greatness of themselves, or of their families. It is true. those prerogatives destructive of public liberty which the late King had affumed, were retrenched from the Crown; and thus far the two Houses agreed. But as to any attempt to transfer to other hands any part of the authority of the Crown, no proposal was even made about it. Those branches of prerogative which were taken from the kingly office, were annihilated and made to cease to exist in the State; and all the Executive authority that was thought necessary to be continued in the Government, was, as before, left undivided in the Crown.

In the very fame manner was the whole authority of the Crown transferred afterwards to the Princess who succeeded King William the Third, and who had no other claim to it but what was conferred on her by the Parliament. And in the same manner again was it settled, a long time be-

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forehand, on the Princes of Hanover who have fince succeeded her \*.

Nay, one more extraordinary fact, and to which I defire the Reader to give attention—Notwith-flanding all the Revolutions we mention, and although Parliament hath fat every year fince the beginning of this century, and though they have constantly enjoyed the most unlimited freedom both as to the subjects and the manner of their deliberations, and numberless proposals have in consequence been made,—yet, such has been the

It may not be improper to observe here, as a farther proof of the indivisibility of the power of the Crown (which has been above faid to refult from the peculiar frame of the English Government) that no part of the Executive authority of the King is vested in his Privy Council, as we have seen it was in the Senate of Sweden: the whole business centers in the Sovereign; the votes of the Members are not even counted, if I am well informed: and in fact the constant ftyle of the Law, is the King in Council, and not the King and Council, A proviso is indeed sometimes added to some Bills, that certain acts mentioned in them are to be transacted by the King in Council: but this is only a precaution taken in the view that the most important affairs of a great Nation may be transacted with proper folemnity, and to prevent, for instance, all objections that might, in process of time, be drawn from the uncertainty whether the King has affented, or not, to certain particular transactions. The King names the Members of the Privy Council: or excludes them, by caufing their names to be struck out of the Book.

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efficiency of each House, in destroying, preventing, or qualifying, the views of the other, that the Crown has not been obliged during all that time to make use, even once, of its negative voice; and the last Bill rejected by a king of England, has been that rejected by King William the Third in the year 1692, for Triennial Parliaments.

There is another instance yet more remarkable of this forbearing conduct of the Parliament in regard to the Crown, to whatever open or latent cause it may be owing, and how little their esprit de corps in reality leads them, amidst the apparent heat fometimes of their struggles, to invade its governing executive authority; I mean, the facility with which they have been prevailed upon to give up any effential branch of that authority, even after a conjunction of preceding circumstances had caused them to be actually in possesfion of it: a case this, however, that has not frequently happened in the English History. After the Restoration of Charles the Second, for instance, we find the Parliament to have of their own accord passed an Act, in the first year that followed that event, by which they annihilated, at one stroke, both the independent legislative au-

<sup>\*</sup> He assented a few years afterwards to that Bill, after feveral amendments had been made in it.

thority, and all claims to fuch authority, which they had affumed during the preceding diffurbances: by the Stat. 13 Ca. II. c. 1. it was forbidden, under the penalty of a premunire (see p. 92.) to affirm that either of the two Houses of Parliament, or both jointly, possess, without the concurrence of the King, the Legislative autho-In the fourth year after the Restoration, another capital branch of the governing authority of the Crown was also restored to it, without any manner of struggle: - by the Stat. 16 Car. II. c. 1. the Act was repealed by which it had been enacted, that in case the King should neglect to call a Parliament once at least in three years, the Peers should iffue the writs for an election; and that should they neglect to issue the same, the Conftituents should of themselves assemble to elect a Parliament.

It is here to be observed, that, in the same reign we mention, the Parliament passed the Habeas Corpus Act, as well as the other Acts that prepared the same, and in general shewed a jealousy in watching over the liberty of the subject, superior perhaps to what has taken place at any other period of the English History: this is another striking confirmation of what has been remarked in a preceding Chapter, concerning the manner in which public disturbances have always been terminated.

minated in England. Here we find a feries of Parliaments to have been tenaciously and perfeverantly jealous of those kinds of popular univerfal provisions which great Men in other States ever disdained seriously to think of, or give a place to, in those treaties by which internal peace was restored to the Nation; and at the same time these Parliaments cordially and fincerely give up those high and splendid branches of Governing authority, which the Senates of Affemblies of great Men who furrounded the Monarchs in other limited Monarchies, never ceased anxiously to strive to assume to themselves, -and which the Monarchs, after having loft them, never were able to recover but by military violence aided by furprize, or through National commotions. All these are political singularities, certainly remarkable enough, It is a circumstance in no fmall degree conducive to the folidity of the executive authority of the English Crown (which is the fubject of this Chapter) that those persons who seem to have in their power to wrest the same from it, are, somehow, prevented from entertaining thoughts of doing fo \*.

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<sup>•</sup> I will mention another instance of this real disinterestedness of the Parliament in regard to the power of the Crown,—nay, of the strong bent that prevails in that Assembly, to make

As another proof of the peculiar folidity of the power of the Crown, in England, may be mentioned

make the Crown the general depository of the executive authority of the Nation; I mean to speak of the manner in which they use to provide for the execution of those resolutions of an active kind they may at times come to: it is always by addressing the Crown for that purpose, and desiring it to interfere with its own executive authority. Even, in regard to the printing of their Journals, the Crown is applied to by the Commons, with a promise of making good to it the necessary expences. Certainly, if there existed in that Body any latent anxiety, and real ambition (I speak here of the general tenor of their conduct) to invest themselves with the executive authority in the State, they would not give up the providing by their own authority at least for the object just mentioned: it might give them a pretence for having a fet of Officers belonging to them, as well as a Treasury of their own, and in short for establishing in their favour some fort of beginning or precedent: at the same time that a wish on their part, to be the publishers of their own Journals, could not be decently opposed by the Crown, nor would be likely to be found fault with by the Public. To some readers the fact we are speaking of may appear trifling; to me it is not fo: I confess I never happen to see a paragraph in the newspapers, mentioning an address to the Crown for borrowing its executive prerogative in regard to the inconfiderable object here alluded to, without paufing for half a minute on the article. Certainly there must needs exist causes of a very peculiar nature which produce in an Affembly possessed of so much weight, that remarkable freedom from any ferious ambition to push their advantages farther, -which imspire it with

tioned the facility, and fafety to itself and to the State, with which it has at all times been able to deprive any particular Subjects of their different offices, however overgrown, and even dangerous, their private power may seem to be. A very remarkable instance of this kind occurred when the great Duke of Marlborough was suddenly removed from all his employments: the following is the account given by Dean Swift in his "History of the Four last Years of the Reign of "Oueen Anne."

"So that the Queen found herfelf under a necessity, by removing one person from so great a trust, to get clear of all her dissiculties at once: her Majesty determined upon the latter expedient, as the shorter and safer course; and during the recess at Christmas, sent the Duke a letter to tell him she had no farther occasion for his service.

"There has not perhaps in the prefent age been a clearer instance to shew the instability of power, which is not founded on virtue:

the great political forbearance we have mentioned, with fo fincere an indifference in general, in regard to arrogating to themselves any branch of the executive authority of the Crown:—they really seem as if they did not know what do do with it after having acquired it, nor of what kind of service it may be to them.

" and

" and it may be an inftruction to Princes who are well in the hearts of their People, that the overgrown power of any particular person, although supported by exorbitant wealth, can, by a little resolution, be reduced in a moment, without any dangerous consequences. This Lord, who was, beyond all comparison, the greatest subject in Christendom, sound his power, credit, and influence crumble away on a sudden; and except a few friends and solutions, the rest dropped off in course, &c." (B. I. near the end).

The ease with which such a Man as the Duke was fuddenly removed, Dean Swift has explained by the necessary advantages of Princes who posfess the affection of their People, and the natural weakness of power which is not founded on virtue. However, these are very unsatisfactory explanations. The History of Europe, in former times, offers us a continued feries of examples to the contrary. We see in it numberless instances of Princes inceffantly engaged in relifting in the field the competition of the Subjects invested with the eminent dignities of the Realm, who were not by any means superior to them in point of virtue, -or at other times, living in a continued state of vasfalage under some powerful Man whom they durst not relift, and whose power, credit, and influence

they would have found it far from possible to reduce in a moment, or crumble on a sudden, by the sending of a single letter, even though assisted by a little resolution, to use Dean Swift's expressions, and without any dangerous consequences.

Nay, certain Kings, such as Henry the Third of France, in regard to the Duke of Guise, and James the Second of Scotland, in regard to the two Earls of Douglas successively, had at last recourse to plot and assistances, and expedients of a similar sudden violent kind, are the settled methods adopted by the Eastern monarchs; nor is it very sure they can always easily do otherwise.

Even in the present Monarchies of Europe, notwithstanding the awful force by which they are outwardly supported, a discarded Minister is the cause of more or less an xiety to the go-

• We might also mention here the case of the Emperor Ferdinand II. and the Duke of Walstein, which seems to have at the time made a great noise in the world.—The Earls of Douglas were sometimes attended by a retinue of two thousand horse. See Dr. Robertson's History of Scotland.—The Duke of Guise was warned some hours before his death, of the danger of trusting his person into the king's presence or house; he answered, On n'oseroit.—They durst not.

If Mary, Queen of Scots, had possessed a power analogous to that exerted by Queen Anne, she might perhaps have avoided being driven into those instances of ill-conduct which were followed by such tragical consequences.

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verning Authority; especially if, through the length of time he has been in office, he happens to have acquired a considerable degree of influence. He is generally sent and confined to one of his estates in the country, which the Crown names to him: he is not allowed to appear at Court, nor even in the Metropolis; much less is he suffered to appeal to the People in loud complaints, to make public speeches to the great Men in the State, and intrigue among them, and in short to vent his resentment by those bitter, and sometimes desperate methods, which in the Constitution of this Country, prove in great measure harmless.

But a Diffolution of the Parliament, that is, the difmiffion of the whole body of the great Men in the Nation, affembled in Legislative capacity, is a circumstance in the English Government, in a much higher degree remarkable and deserving our notice, than the depriving any single individual, however powerful, of his public employments. When we consider in what easy and complete manner such a dissolution is effected in England, we must need become convinced that the power of the Crown bears upon foundations of very uncommon, though perhaps hidden, strength; especially, if we attend to the several facts that take place in other Countries.

PELITIZY

In France, for example, we find the Crown, notwithstanding the immense outward force by which it is surrounded, to use the utmost caution in its proceedings towards the Parliament of Paris: an Assembly only of a judiciary nature, without any Legislative authority or avowed claim, and which, in short, is very far from having the same weight in the kingdom of France, as the English Parliament has in England. The King never repairs to that Assembly, to signify his intentions, or hold a Lit de Justice without the most overawing circumstances of military apparatus and preparation, constantly choosing to make his appearance among them rather as a military General, than as a King.

And when the late King, having taken a ferious alarm at the proceedings of this Parliament, at length refolved upon their dismission, he fenced himself, as it were, with his army; and military Messengers were sent with every circumstance of secrecy and dispatch, who, at an early part of the day and at the same hour, surprised each Member in his own house, causing them severally to depart for distant parts of the country which were prescribed to them, without allowing them time to consider, much less to meet, and hold any consultation together.

But the person who is invested with the kingly office, in England, has need of no other weapon, no other artillery, than the Civil Infignia of his dignity to effect a diffolution of the Parliament. He steps into the middle of them, telling them they are diffolved; and they are diffolved:-he tells them, they are no longer a Parliament; and they are no longer fo. Like Popilius's wand , a diffolution instantly puts a stop to their warmest debates and most violent proceedings. The wonderful words by which it is expressed have no sooner met their ears, than all their legislative faculties are benumbed: though they may still be sitting on the same benches, they look no longer upon themselves as forming an Affembly: they no longer confider each other in the light of Affociates or of Colleagues. As if some strange kind of weapon, or a fudden magical effort, had been exerted in the midst of them, all the bonds of their union are cut off; and they haften away, without having fo much as the thought of continuing for a fingle minute the duration of their Affembly †.

To

<sup>·</sup> He who ftopt the army of King Antiochus.

<sup>†</sup> Nor has London post-horses enough to drive them far and near into the Country in case the declaration by which the Parliament is dissolved, also mentions the calling of a new one.

To all these observations concerning the peculiar solidity of the authority of the Crown, in England, I shall add another that is supplied by the whole series of the English History; which is, that, though bloody broils and disturbances

A Diffolution, when proclaimed by a common Crier affifted by a few Beadles, is attended by the very same effects.

To the account of the expedient used by the late King of France to effect the dismission of the Parliament of Paris, we may add the manner in which the Crown of Spain, in a higher degree arbitrary perhaps than that of France, undertook some years ago, to rid itself of the religious Society of the Jesuits, whose political influence and intrigues had grown to give it umbrage. They were seized by an armed force at the same minute of the same day, in every Town or Borough of that extensive Monarchy where they had residence, in order to their being hurried away to ships that were waiting to carry them into another Country: the whole business being conducted with circumstances of secrecy, surprize, and of preparation far superior to what is related of the most celebrated conspiracies mentioned in History.

The Diffolution of the Parliament which Charles the Second had called at Oxford, is an extremely curious event: a very lively account of it is to be found in Oldmixon's History of England.

If certain alterations, however imperceptible they may perhaps be, at first to the public eye, ever take place, the period may come at which the Crown will no longer have it in its power to dissolve the Parliament; that is to say, a dissolution will no longer be followed by the same effects that it is at present.

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have often taken place in England, and war often made against the King, yet it has scarcely ever been done, but by persons who positively and expressly laid claim to the Crown. Even while Cromwell contended with an armed sorce against Charles the First, it was, as every one knows who has read that part of the English history, in the King's own name he waged war against him.

The fame objection might be expressed in a more general manner, and with ftrict truth, by faying that no war has been waged, in England, against the governing authority, except upon national grounds; that is to fay, either when the title to the Crown has been doubtful, or when general complaints, either of a political or religious kind, have arisen from every part of the Nation: as instances of fuch complaints may be mentioned, those that gave rise to the war against King John, which ended in the paffing of the Great Charter,the civil wars in the reign of Charles the First, and the Revolution of the year 1689. From the facts just mentioned it may also be observed as a conclusion that the Crown cannot depend on the great fecurity we have been describing any longer than it continues to fulfil its engagements to the Nation, and to respect those laws which form the compact between it and the People.

And the imminent dangers, or at least the alarms and perplexities, in which the Kings of England have constantly involved themselves, whenever they have attempted to struggle against the general sense of the Nation, manifestly shew that all that has been observed, concerning the security and remarkable stability somehow annexed to their Office, is to be understood, not of the capricious power of the Man, but of the lawful authority of the Head of the State \*.

Second

· One more observation might be made on the subject; which is, that when the kingly dignity has happened in England to be wrested from the possessor, through some revolution, it has been recovered, or struggled for, with more difficulty than in the other Countries: upon earth in all the other countries a King de jure (by claim) possesses advantages in regard to the King in being much superior to those of which the same circumstance may be productive in England. The power of the other Sovereigns in the World, is not so securely established as that of an English King; but then their character is more indelible; that is to fay, -til' their Antagonists have fucceeded in cutting them off and their families, they possess in a high degree a power to renew these claims, and disturb the State. Those family pleas or claims of priority, and in general those arguments to which the bulk of Mankind have agreed to allow fo much weight, cease almost entirely to be of any effect in England, against the person actually invested with the kingly office, as foon as the constitutional parts and fprings have begun to move, and in short as soon as the mashine of the Government has once begun to be in full play.

Second Part of the same Chapter.

THERE is certainly a very great degree of fingularity in all the circumstances we have been describing here: those persons who are acquainted with the history of other Countries, cannot but remark with furprize, that stability of the power of the English Crown,-that mysterious folidity, that inward binding strength with which it is able to carry on with certainty its legal operations, amidst the clamorous struggle and uproar with which it is commonly furrounded, and without the medium of any armed threatening force. To give a demonstration of the manner in which all these things are brought to bear and operated, is not, as I faid before, my defign to attempt here; the principles from which such demonstration is to be derived, suppose an enquiry into the nature of Man, and of human af-

An universal national ferment, fimilar to that which produced the former disturbances, is the only time of real danger.

The remarkable degree of internal national quiet, which, for very near a century past, has followed the Revolution of the year 1689, is a remarkable proof of the truth of the observations above made; nor do I think that, all circumstances being considered, any other Country can produce the like instance.

fairs, which rather belongs to philosophy (though to a branch hitherto unexplored) than to Politics: at least fuch an enquiry certainly lies out of the fphere of the common Science of Politics \*. However, I had a very material reason in introducing all the above mentioned facts concerning the peculiar stability of the governing authority of England, in that they lead to an observation of a most important political nature; which is, that this stability allows feveral effential branches of English liberty to take place, which without it could not exist. For there is a very essential consideration to be made in every Science, though speculators are fometimes apt to lose fight of it, which is, that in order that things may have existence, they must be possible; in order that political regulations of any kind may obtain their effect, they must imply no direct contradiction, either open or hidden, to the nature of things, or to the other circumstances of the Government. In reafoning from this principle, we shall find that the stability of the Governing executive authority in

It may, if the reader pleases, belong to the Science of Metapolitics; in the same sense as we say Metaphysics; that is, the Science of those things which lie beyond physical, or substantial things, A sew more words are bestowed upon the same subject in the Advertisement, or Presace, at the head of his Work,

England, and the weight it gives to the whole machine of the State, has actually enabled the English Nation, considered as a free Nation, to enjoy several advantages which would really have been totally unattainable in the other States we have mentioned in former Chapters, whatever degree of public virtue we might even suppose to have belonged to those who acted in those States as the Advisers of the People, or in general who were trusted with the business of framing the Laws.

One of these advantages resulting from the Solidity of the Government, is, the extraordinary personal freedom which all ranks of individuals in England enjoy at the expence of the governing authority. In the Roman Commonwealth, for instance, we see the Senate to have been vested with a number of powers totally destructive of the liberty of the Citizens; and the continuance of these powers was, no doubt, in a great measure owing to the treacherous remissiness of those Men in whom the People trusted for repressing them, or even to their determined resolution not to abridge those prerogatives. Yet, if

<sup>\*</sup> I should be very well fatisfied though only the more reflecting class of readers were fully to understand the tendency of this Chapter: in the mean time it is considerably illustrated beyond what it was in the former Editions.

we attentively consider the constant situation of affairs in that Republic, we shall find that though we might suppose those persons to have been ever fo truly attached to the cause of the People, it would not really have been possible for them to procure to the People an entire fecurity. The right enjoyed by the Senate, of fuddenly naming a Dictator with a power unrestrained by any law, or of invefting the Confuls with an authority of much the same kind, and the power it at times assumed of making formidable examples of arbitrary Justice, were resources of which the Republic could not, perhaps, with fafety have been totally deprived: and though these expedients frequently were used to destroy the just liberty of the People, yet they were also very often the means of preferving the Commonwealth.

Upon the same principle we should possibly find the Ostracism, that arbitrary method of banishing Citizens, was a necessary resource in the Republic of Athens. A Venetian Noble would perhaps also confess, that however terrible the State Inquisition established in his Republic, may be even to the Nobles themselves, yet it would not be prudent entirely to abolish it. And we do not know but a Minister of State in France, though we might suppose him ever so virtuous and moderate a Man, would say the same with

regard to the fecret imprisonments, the lettres de eachet, and other arbitrary deviations from the fettled course of law, which often take place in that Kingdom, and in the other Monarchies of Europe. No doubt, if he was the Man we suppose, he would confess the expedients we mention have in numberless instances been villainously prostituted to gratify the wantonness and private revenge of Ministers, or of those who had any interest with them; but still perhaps he would give it as his opinion, that the Crown, notwithstanding its apparently immense strength, cannot avoid recurring at times to expedients of this kind; much less could it publicly and absolutely renounce them for ever.

It is therefore a most advantageous circumstance in the English Government, that its security renders all such expedients unnecessary, and that the Representatives of the People have not only been constantly willing to promote the public liberty, but that the general situation of affairs has also enabled them to carry their precautions so far as they have done. And indeed, when we consider what prerogatives the Crown, in England, has sincerely renounced—that in consequence of the independence conferred on the Judges and of the method of Trial by Jury, it is deprived of all means of influence that in consequence of the independence conferred on the Judges and of the method of

fluencing the fettled course of the law both in civil and criminal matters,-that it has renounced all power of feizing the property of individuals, and even of reftraining in any manner whatfoever, and for the shortest time, the liberty of their persons, we do not know what we ought most to admire, whether the public virtue of those who have deprived the supreme Executive Power of all those dangerous prerogatives, or the nature of that same Power, which has enabled it to give them up without ruin to itselfwhether the happy frame of the English Government, which makes those in whom the People trust, continue so faithful in the discharge of their duty, or to the folidity of that fame Government, which really can afford to leave to the People fo extensive a degree of freedom \*.

Again

• At the times of the invasions of the Pretender, assisted by the forces of hostile Nations, the Habeas Corpus Act was indeed suspended (which by the bye may serve as one proof, that in proportion as a Government is any how in danger, it becomes necessary to abridge the liberty of the subject;) but the executive power did not thus of itself stretch its own authority; the precaution was deliberated upon and taken by the Representatives of the People; and the detaining of individuals in consequence of the suspension of the Act, was limited to a certain fixed time. Notwithstanding the just fears of internal and hidden enemies which the circumstances of the times might raise, the deviation from the former

Again, the Liberty of the Press, that great advantage enjoyed by the English nation, does not exist in any of the other Monarchies of Europe, however well established their power may at first feem to be; and it might even be demonstrated that it cannot exist in them. The most watchful eye, we see, is constantly kept in those Monarchies upon every kind of publication; and a jealous attention is paid even to the loofe and idle speeches of individuals. Much unnecessary trouble (we may be apt at first to think) is taken upon this fubject; but if we consider how uniform the conduct of all those Governments is, how constant and unremitted their cares in those respects, we shall become convinced, without looking farther, that there must be some fort of necessity for their precautions.

In Republican States, for reasons which are at bottom the same as in the before mentioned Governments, the People are also kept under

course of the law was carried no farther than the single point we have mentioned: Persons detained by order of the Government, were to be dealt with in the same manner as those arrested at the suit of private individuals: the proceedings against them were to be carried on no otherwise than in a public place: they were to be tried by their Peers, and have all the usual legal means of defence allowed to them, such as calling of witnesses, peremptory challenge of Juries, &c.

the greatest restraints by those who are at the head of the State. In the Roman Commonwealth, for instance, the liberty of writing was curbed by the feverest laws \*: with regard to the freedom of speech, things were but little better, as we may conclude from feveral facts; and many instances may even be produced of the dread with which the private Citizens, upon certain occasions, communicated their political opinions to the Confuls, or to the Senate. In the Venetian Republic, the press is most strictly watched: nay, to forbear to speak in any matter whatfoever on the conduct of the Government, is the fundamental maxim which they inculcate on the minds of the People throughout their dominions +,

With

<sup>\*</sup> The Law of the Twelve Tables had established the punishment of death against the author of a Libel: nor was it by a Trial by Jury that they determined what was to be called a Libel. SI QUIS CARMEN OCCENTASSIT, AC-TITASSIT, CONDIDISSIT, QUOD ALTERI FLAGITIUM FAXIT, CAPITAL ESTO.

<sup>†</sup> Of this I have myself seen a proof somewhat singular, which I beg leave of the Reader to relate. Being, in the year 1768, at Bergamo, the first Town of the Venetian State, as you come into it from the State of Milan, about an hundred and twenty miles distant from Venice, I took a walk in the evening in the neighbourhood of the Town; and wanting to know the name of feveral places which I faw

With respect therefore to this point, it may again be looked upon as a most advantageous circumstance in the English Government, that those who have been at the head of the People, have not only been constantly disposed to procure the public liberty, but also that they have found it possible for them to do so; and that the remarkable strength and steadiness of the Government has admitted of that extensive freedom of speaking and writing which the People of England enjoy. A most advantageous privilege,

at a distance, I stopped a young Countryman to ask him information. Finding him to be a fenfible young Man, I entered into some farther conversation with him; and as he had himself a great inclination to see Venice, he asked me, whether I proposed to go there? I answered that I did: on which he immediately warned me when I was at Venice not to speak of the Prince (del Prencipe) an appellation assumed by the Venetian Government, in order, as I suppose, to convey to the People a greater idea of their union among themselves. As I wanted to hear him talk farther on the Subject, I pretended to be entirely ignorant in that respect, and asked for what reason I must not speak of the Prince? But he, (after the manner of the common People in Italy, who, when strongly affected by any thing, rather choose to express themselves by some vehement gesture, than by words) ran the edge of his hand, with great quickness, along his neck, meaning thereby to express, that being strangled, or having one's throat cut, was the instant consequence of taking fuch liberty.

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this! which, affording to every Man a means of laying his complaints before the Public, procures him almost a certainty of redress against any act of oppression that he may have been exposed to: and which leaving, moreover, to every Subject a right to give his opinion on all public matters, and by thus influencing the fentiments of the Nation, to influence those of the Legislature itself (which is sooner or later obliged to pay a deference to them), procures to him a fort of Legislative authority of a much more efficacious and beneficial nature than any formal right he might enjoy of voting by a mere yea or nay, upon general propositions suddenly offered to him, and which he could have neither a share in framing, nor any opportunity of objecting to, and modifying.

A privilege which, by raising in the People a continual sense of their security, and affording them undoubted proofs that the Government, whatever may be its form, is ultimately destined to ensure the happiness of those who live under it, is both one of the greatest advantages of Freedom, and its surest characteristic. The kind of security as to their persons and possessions which Subjects who are totally deprived of that privilege, enjoy at particular times, under other Governments, perhaps may intitle them to

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look upon themselves as the well administered property of Masters who rightly understand their own interests; but it is the right of canvassing without fear the conduct of those who are placed at their head which constitutes a free Nation\*.

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The unbounded freedom of debate possessed by the English Parliament, is also a consequence of the peculiar stability of the Government. All Sovereigns have agreed in their jealousy of Assemblies of this kind, in their dread of the privileges of Assemblies who attract in so high a degree the attention of the rest of the People, who in a course of time become connected by so many essential ties with the bulk of the Nation, and acquire so much real influence by the essential share they must needs have in the management of public affairs, and by the eminent services, in short, which they are able to perform to the Community †. Hence it has happened

\* If we consider the great advantages to public liberty which result from the institution of the Trial by Jury, and from the Liberty of the Press, we shall find England to be in reality a more Democratical State than any other we are acquainted with. The Judicial power, and the Censorial power, are vested in the People.

† And which they do actually perform, till they are able to throw off the restraints of impartiality and moderation; a thing d

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countries, have endeavoured to dispense with the Assistance of Assemblies like those we mention, notwithstanding the capital advantages they might have derived from their services towards the good government of the State; or if the circumstances of the times have rendered it expedient for them to call such Assemblies together, they have used the utmost endeavours in abridging those privileges and legislative claims which they soon found to prove so hostile to their security: in short, they have ever found it impracticable to place any unreserved trust in public Meetings of this kind.

We may here name Cromwell, as he was supported by a numerous army, and possessed more power than any foreign Monarch who has not been secured by an armed sorce. Even after he had purged, by the agency of Colonel Pride and two regiments, the Parliament that was sitting when his power became settled, thereby thrusting out all his opponents to the amount of about two hundred, he soon sound his whole authority endangered by their proceedings, and was at last under a necessity of turning them out in the mi-

a thing which, being Men, they never fail to do when their influence is generally established, and proper opportunities offer. Sovereigns know these things, and dread them.

litary manner with which every one is acquainted. Finding still a Meeting of this kind highly expedient to legalize his military authority, he called together that Affembly which was called Barebone's Parliament. He had himself chosen the Members of this Parliament, to the number of about an hundred and twenty, and they had feverally received the fummons from him; vet notwithstanding this circumstance, and the total want of personal weight in most of the Members, he began in a very few months, and in the midst of his powerful victorious army, to feel a ferious alarm at their proceedings; he foon heard them talk of their own divine commission, and of the authority they had received from the Lord; and, in short, finding he could not trust them, he employed the offices of a fecond Colonel, to effect their difmission. Being now dignified with the legal appellation of Protector, he ventured to call a Parliament elected by confiderable parts of the people; but though the existence of this Parliament was grounded, we might fay grafted, upon his own; and though bands of Soldiers were even posted in the avenues to keep out all fuch Members as refused to take certain personal engagements to him, he made such hafte in the iffue, to rid himself of their presence, as to contrive a mean quibble or device to shorten

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them tog the Mon entirely To a fourth Assembly he again applied; but, though the elections had been so managed as to procure him a formal tender of the Crown during the first sitting, he put a final end to the second with resentment and precipitation †.

The example of the Roman Emperors, whose power was outwardly so prodigious; may also be introduced here. They used to shew the utmost jealousy in their conduct with respect to the Roman Senate; and that Assembly which the prepossession of the People, who looked upon it as the ancient remains of the Republic; had made it expedient to continue, were not suffered to assemble but under the drawn scymitars of the Pretorian guards.

Even the Kings of France, though their authority is fo unquestioned, so universally respect-

• They were to have fat five months; but Cromwell pretended that the months were to confift of only twenty-eight days; as this was the way of reckoning time used in paying the army, and the sleet.

+ The history of the conduct of the deliberating and debating Assemblies we are alluding to, in regard to the Monarchs, or single Rulers of any denomination, who summon them together, may be expressed in a very few words. If the Monarch is unarmed, they over-rule him so as almost entirely to set him aside: if his power is of a military kind, they form connections with the army.

ed, as well as ftrongly supported, have felt frequent anxiety from the claims and proceedings of the Parliament of Paris; an Affembly of fo much less weight than the English Parliament. The alarm has been mentioned which the late King at last expressed concerning their measures, as well as the expedient to which he reforted, to free himself from their presence. And when the present King thought proper to call again this Parliament together, a measure highly prudent in the beginning of his reign, every jealous precaution was at the fame time taken to abridge those privileges of deliberating and remonstrating upon which any diftant claim to, or struggle for, a share in the Supreme authority might be grounded.

It may be objected that the pride of Kings, or fingle Rulers, makes them averse to the existence of Assemblies like those we mention, and despise the capital services which they might derive from them for the good government of their Kingdoms. I grant it may in some measure be so. But if we examine into the general situation of affairs in different States, and into the examples with which their History supplies us, we shall also find that the pride of those Kings agrees in the main with the interest and quiet of their Subjects, and that their preventing the Assembly.

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blies we speak of from meeting, or, when met, from assuming too large a share in the management of public affairs, is, in a great measure, matter of necessity.

We may therefore reckon it as a very great advantage, that, in England, no fuch necessity exists. Such is the frame of the Government, that the Supreme executive authority can both give leave to assemble, and shew the most unreferved trust, when assembled, to those two Houses which concur together to form the Legislature.

These two Houses, we see, enjoy the most complete freedom in their debates, whether the fubject be grievances, or regulations concerning government matters of any kind: no restriction whatever is laid upon them; they may flart any fubject they please. The Crown is not to take any notice of their deliberations: its wishes, or even its name, are not to be introduced in the debates. And, in short, what makes the freedom of deliberating, exercised by the two Houses, really to be unlimited, unbounded, is the privilege, or fovereignty we may fay, enjoyed by each within its own walls, in confequence of which nothing done or faid in Parliament, is to be questioned in any place out of Parliament. Nor will it be pretended by those persons who

are acquainted with the English History, that those privileges of Parliament we mention are nominal privileges, only privileges upon paper, which the Crown has difregarded whenever it has thought proper, and to the violations of which the Parliament have used very tamely to submit. That thefe remarkable advantages,—that this total freedom from any compulsion or even fear, and in short this unlimited liberty of debate, so strictly claimed by the Parliament, and fo scrupuloufly allowed by the Crown, should be exercifed year after year during a long course of time, without producing the least relaxation in the execution of the laws, the smallest degree of anarchy, are certainly very fingular political phenomena.

It may be faid that the remarkable Solidity of the governing Executive authority, in England, operates to the advantage of the People with respect to the objects we mention, in a two-fold manner. In the first place, it takes from the great Men in the Nation all serious ambition to invade this authority, thereby preventing those anarchical and more or less bloody struggles to result from their debates, which have so constantly disturbed other Countries. In the second place, it inspires those Great Men with that salutary jealousy of the same authority which leads them.

them to frame fuch effectual provisions for laying it under proper restraints. On which I shall observe, by way of a short digression, that this diftinguished stability of the executive authority of the English Crown, affords an explanation for the peculiar manner in which public commotions have constantly been terminated in England, compared with the manner in which the fame events have been concluded in other Kingdoms. When I mentioned, in a former Chapter, this peculiarity in the English Government, I mean the accuracy, impartiality, and universality of the provisions by which peace, after internal diffurbances, has been restored to the Nation, I confined my comparisons to instances drawn from Republican Governments. purposely postponing to fay any thing of Governments of a Monarchical form, till I had introduced the very effential observation contained in this Chapter, which is, that the power of Growns, in other Monarchies, has not been able, by itfelf, to produce the same effects it has in England, that is, has not been able to inspire the Great Men in the State with any thing like that falutary jealoufy we mention, nor of course to induce them to unite in a real common cause with the rest of the People. In other Monar-Ee 3 chies,

chies\*, those Men who, during the continuation of the public diffurbances, were at the head of the People, finding it in their power, in the iffue, to parcel out, more or less, the Supreme governing authority (or even the State itself), and to transfer the same to themselves, constantly did fo, in the same manner, and from the very fame reasons, as it constantly happened in the ancient Commonwealths; those Monarchical Governments being in reality, fo far as that, of a Republican nature: and the governing authority was left, at the conclusion, in the same undefined extent it had before †. But in England, the great Men in the Nation finding themselves in a fituation effentially different, lost no time in pursuits like those in which the great Men of other countries used to indulge themselves on the occasion we mention. Every Member of the Legislature plainly perceived, from the general

<sup>\*</sup> I mean, before the introduction of those numerous standing armies which are now kept by all the Crowns of Europe: fince that epoch, which is of no very ancient date, no Treaty has been entered into by those Crowns with any Subjects.

<sup>+</sup> As a remarkable instance of such a Treaty may be mentioned that by which the War for the Public good was terminated in France. It is quoted in page 29 of this Work.

aspect of affairs and his feelings, that the Supreme executive authority in the State must in the issue fall fome where undivided, and continue fo; and being moreover fenfible, that neither personal advantages of any kind, nor the power of any faction, but the law alone, could afterwards be an effectual restraint upon its motions, they had no thought or aim left, except the framing with care those laws on which their own liberty was to continue to depend, and to reftrain a power which they, fomehow, judged it fo impracticable to transfer to themselves or their party, or to render themselves independent of. These observations I thought necessary to be added to those in the xv. Chapter, to which I now refer the reader.

Nor has the great freedom of canvassing political subjects we have described, been limited to the Members of the Legislature, or confined to the walls of Westminster, that is, to that exclusive spot on which the two Houses meet: the like privilege is allowed to the other orders of the People; and a full scope is given to that spirit of party, and a complete security insured to those numerous and irregular meetings, which, especially when directed to matters of government, create so much uneasiness in the Sovereigns of other Countries. Individuals even may, in

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fuch meetings, take an active part for procuring the fuccess of those public steps which they wish to see pursued; they may frame petitions to be delivered to the Crown, or to both Houses, either to procure the repeal of measures already entered upon by Government, or to prevent the passing of such as are under consideration, or to obtain the enacting of new regulations of any kind: they may severally subscribe their names to such petitions: the law sets no restriction on their numbers; nor has it, we may say, taken any precaution to prevent even the abuse that might be made of such freedom.

That mighty political engine, the press, is also at their service; they may avail themselves of it to advertise the time and place, as well as the intent, of the meetings, and moreover to set off and inculcate the advantages of those notions which the wish is to see adopted.

Such meetings may be repeated; and every individual may deliver what opinion he pleases on the proposed subjects, though ever so directly opposite to the views or avowed designs of the Government. The Member of the Legislature may, if he chooses, have admittance among them, and again enforce those topics which have not obtained the success he expected, in that House to which he belongs. The disappointed States-

men, the Minister turned out, also find the door open to them: they may bring in the whole weight of their influence and of their connections: they may exert every nerve to enlift the Affembly in the number of their supporters: they are bid to do their worst: they fly through the Country from one place of meeting to another : the clamour increases; the Constitution, one may think, is going to be shaken to its very foundations:-but these mighty struggles, by some means or other, always find a proportionate degree of re-action; new difficulties, and at last insuperable impediments, grow up in the way of those who would take advantage of the general ferment to raise themselves on the wreck of the governing Authority: a fecret force exerts itself, which gradually brings things back to a state of moderation and calm; and that fea fo stormy, to appearance fo deeply agitated, conftantly stops at certain limits which it feems as if it wanted the power to pass.

The impartiality with which justice is dealt to all orders of Men in England, is also in great measure owing to the peculiar stability of the Government: the very remarkable, high degree, to which this impartiality is carried, is one of those things which, being impossible in other Countries, are possible under the Government of this

Country,

Country. In the ancient Commonwealths, from the inflances that have been introduced in a former place, and from others that might be quoted, it is evident that no redrefs was to be obtained for the acts of injustice or oppression committed by the Men possessed of influence or wealth upon the inferior Citizens. In the Monarchies of Europe, in former times, abuses of a like kind prevailed to a most enormous degree. In our days, notwithstanding the great degrees of strength acquired by the different Governments, it is matter of the utmost difficulty for subjects of the inferior classes to obtain the remedies of the law against certain individuals; in some Countries it is impossible, let the abuse be ever so flagrant; an open attempt to purfue fuch remedies being moreover attended with danger. Even in those Monarchies of Europe in which the Government is supported both by real strength, and by civil Institutions of a very advantageous nature, great differences prevail between individuals in regard to the facility of obtaining the remedies of the law: and to feek for redress is at best in many cases, so arduous and precarious an attempt as to take from injured individuals all thoughts of encountering the difficulty. Nor are these abuses we mention, in the former or present Governments of Europe, to be attributed only to the

the want of resolution in the heads of these Governments. In fome countries, the Sovereign by an open defign to suppress these abuses, would have endangered at once his whole authority; and in others, he would find obstructions multiply fo in his way as to compel him, and perhaps foon enough too, to drop the undertaking.-How can a Monarch make, alone, a perfevering fland against the avowed expectations of all the great Men by whom he is furrounded, and against the loud claims of powerful classes of individuals? In a Commonwealth, what is the Senate to do when they find that their refusing to protect a powerful offender of their own class, or to indulge fome great Citizen with the impunity of his friends, is likely to be productive of ferious divisions among themselves, or perhaps of difturbances among the People?

If we cast our eyes on the strict and universal impartiality with which justice is administered in England, we shall soon become convinced that some inward essential difference exists between the English Government, and those of other Countries, and that its power is sounded on causes of a distinct nature. Individuals of the most exalted rank do not entertain so much as the thought to raise the smallest direct opposition to the operation of the law. The complaint of

the meanest Subject, if preferred and supported in the usual way, immediately meets with a serious regard. The Oppressor of the most extensive influence, though in the midst of a train of retainers, nay, though in the fullest slight of his career and pride, and surrounded by thousands of applauders and partisans, is stopped short at the sight of the legal paper, which is delivered into his hands, and a Tipstaff is sufficient to bring him away, and produce him before the Bench.

Such is the greatness and uninterrupted prevalence of the law \*, such is in short the continuity of omnipotence, of resistless superiority, it exhibits that the extent of its effects at length ceases to be a subject of observation to the Public.

Nor are great or wealthy Men to feek for redress or satisfaction of any kind, by any other means than such as are open to all; even the Sovereign has bound himself to resort to no other; and experience has shewn that he may without danger trust the protection of his person, and of the places of his residence, to the slow and litigious affistance of the law †.

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<sup>.</sup> Lex magna eft & prævalebit.

<sup>†</sup> I remember, during the time after my first coming to this Country, I took notice of the boards set up from place to place behind the inclosure of Richmond park. "Whoever trespasses upon this ground will be prosecuted."

Another very great advantage attending this remarkable stability of the English Government we are describing, is, that the same is operated without the affiftance of an armed standing force: the constant expedient this, of all other Governments. On this occasion I shall introduce a pasfage of Doctor Adam Smith +, in a Work published since the present Chapter was first written, in which passage an opinion certainly erroneous is contained: the mistakes of persons of his very great abilities deserve attention. This Gentleman, struck with the necessity of a sufficient power of re-action of a sufficient strength, on the side of Government, to refift the agitations attending on liberty, has looked round, and judged the English Government derived the fingular stability it manifests from the standing force it has at its disposal: the following are his expressions: "To a Sovereign who " feels himself supported, not only by the natural " Aristrocracy of the Country, but by a well regu-

<sup>&</sup>quot; lated standing army, the rudest, the most ground-

<sup>&</sup>quot; less, and the most licentious remonstrances can

<sup>&</sup>quot; give little disturbance. He can fafely pardon or

<sup>&</sup>quot; neglect them, and his consciousness of his fu-

<sup>&</sup>quot; periority naturally disposes him to do so. That

degree of liberty which approaches to licentiousness,

<sup>†</sup> An Inquiry into the Nature and Causes of the Wealth of Nations. Book V. Chap. I. vol. II. p. 313, 314.

" can be tolerated only in Countries where the Sovereign is secured by a well regulated standing army \*."

The above positions are grounded on the notion, that an army places in the hand of the Sovereign an united irrefiftible strength, a strength liable to no accident, difficulties, or exceptions; a supposition this, which is not conformable to experience. If a Sovereign was endued with a kind of extraordinary power attending on his person, at once to lay under water whole legions of infurgents, or to repulse and sweep them away by flashes and shocks of the electrical fluid, then indeed he might use the great forbearance above described:—though it is not perhaps very likely he would put up with the rude and groundless remonstrances of his subjects, and with their licentious freedom, yet he might, with fafety, do or not do fo, at his own choice. But an army is not that fimple weapon which is here fupposed. It is formed of Officers and Soldiers who feel the fame passions with the rest of the people, the fame disposition to promote their own interest and importance, when they find out their

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<sup>\*</sup> The Author's defign in the whole passage, is to shew that standing armies, under proper restrictions, cannot be hurtful to public liberty; and may in some cases be useful to it, by freeing the Sovereign from any troublesome jealousy in regard to this liberty.

ftrength, and proper opportunities offer. What will therefore be the refource of the Sovereign, if, into that army on the affiftance of which he relies, the fame party spirit creeps by which his other Subjects are actuated? Whereto will he take his refuge, if the same political caprices, abated by the serious ambition of a few leading Men, the same restlessness, and at last perhaps the same disaffection, begin to pervade the smaller kingdom of the army, by which the main Kingdom or Nation are agitated?

The prevention of dangers like those just mentioned, constitutes the most effential part of the precautions and flate craft of Rulers, in those Governments which are fecured by standing armed forces. Mixing the troops formed of natives with foreign auxilaries, difperfing them in numerous bodies over the country, and continually shifting their quarters, are among the methods that are used; which it does not belong to our fubject to enumerate, any more than the extraordinary expedients employed by the Eastern Monarchs for the fame purposes. But one caution very effential to be mentioned here, and which the Governments we allude to, never fail to take before every other, is to retrench from their unarmed Subjects, a freedom which, transmitted to the Soldiery, would be attended with fo fatal con-

fequences:

fequences: hindering so bad examples from being communicated to those in whose hands their power and life are trusted, in what every notion of self-preservation suggest to them: every weapon is accordingly exerted to suppress the rising and spreading of so awful a contagion.

In general, it may be laid down as a maxim, that, where the Sovereign looks to his army for the fecurity of his person and authority, the same military laws by which this army is kept together, must be extended over the whole Nation: not in regard to military duties and exercises; but eertainly in regard to all that relates to the respect due to the Sovereign and to his orders. The martial law, concerning these tender points, must be univerfal. The jealous regulations concerning mutiny and contempt of orders, cannot be feverely enforced on that of the Nation which secures the subjection of the rest, and enforced to through the whole scale of military subordination, from the Soldier to the Officer, up to the very Head of the military System,—while the more numerous and inferior part of the People are left to enjoy an unrestrained freedom :- that secret disposition which prompts Mankind to resist and counteract their Superiors, cannot be furrounded by fuch formidable checks on the one fide, and

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be left to be indulged to a degree of licentiousness and wantonness, on the other.

In a Country where an army is kept, capable of commanding the obedience of the Nation, this army will, both imitate for themselves the licentiousness above mentioned, and check it in the People. Every Officer and Soldier, in such a Country, claim a superiority in regard to other individuals; and in proportion as their affistance is relied upon by the Government, expect a greater or less degree of submission from the rest of the Poeple.

The

In the beginning of the passage which is here examined, the Author fays, "Where the Sovereign is himfelf the " General, and the principal Nobility and Gentry of the " Country, the chief Officers of the army, -where the mili-" tary force is placed under the command of those who have the greatest interest in the support of the civil authority, be-" cause they have the greatest share of that authority, a " flanding army can never be dangerous to liberty. On the contrary, it may in some cases be favourable to liberty, &c. " &c."-In a Country fo circumstanced a standing army can never be dangerous to liberty: no, not the liberty of those principal Nobility and Gentry, especially if they have wit enough to form combinations among themselves against the Sovereign. Such an union as is here mentioned, of the civil and military powers, in the Aristocratical body of the Nation, leaves both the Sovereign and the People without resource. If the former Kings of Scotland had imagined to

The fame Author concludes his above quoted observations concerning the security of the power of an armed Sovereign, by immediately adding: "It is in such Countries only that it is unnecessary that the Sovereign should be trusted with any discretionary power for suppressing even the wantonness of this licentious liberty." The idea here expressed coinciding with those already discussed, I shall say nothing farther on the subject. My reason for introducing the above

adopt the expedient of a standing army, and had trusted this army thus defrayed by them, to those Noblemen and Gentlemen who had rendered themselves hereditary Admirals, hereditary High Stewards, hereditary High Constables, hereditary Great Chamberlains, hereditary Justices General, hereditary Sheriss of Counties, &c. they would have but badly mended the disorders under which the Government of their Country laboured: they would only have supplied these Nobles with fresh weapons against each other, against the Sovereign, and against the People.

If those Members of the British Parliament who sometimes make the whole Nation resound with the clamour of their dissensions, had an army under their command which they might engage in the support of their pretensions, the rest of the People would not be the better for it. Happily the swords are secured, and sorce is removed from their Debates.

The Author we are quoting, has deemed a Government to be a simpler machine, and an army a simpler instrument, than they in reality are. Like many other persons of great abilities, while struck with a certain peculiar consideration, he has overlooked others no less important.

expressions, has been, that they lead me to take notice of a remarkable circumstance in the English Government. From the expression, it is unnecessary the Sovereign should be trusted with any discretionary power, the Author appears to think that a Sovereign at the head of an army, and whose power is fecured by this army, uses to wait to fet himself in motion, till he has received leave for that purpose, that is, till he has been trusted with a power for fo doing. This notion in the Author we quote, is borrowed from the steady and thoroughly legal Government of this Country; but the like law doctrine, or principle, obtains under no other Government. In all Monarchies, (and it is the fame in Republics) the Executive power in the State is supposed to possess, originally and by itself, all manner of lawful authority: every one of its exertions is deemed to be legal; and they do not cease to be fo, till they are stopped by some express and pofitive regulation. The Sovereign, and also the civil Magistrate, till so stopped by some positive law, may come upon the Subject when they choose: they may question any of his actions; they may construe them into unlawful acts; and inflict a penalty, as they please: in these respects they may be thought to abuse, but not to exceed, their power. The authority of the Government, in short, is supposed to be unlimited

fo far as there are no visible boundaries set up against it: behind and within these boundaries, lies whatever degree of liberty the Subject may possess.

In England, the very reverse obtains. It is not the authority of the Government, it is the liberty of the Subject, which is supposed to be unbounded. All the Individual's actions are supposed to be lawful, till that law is pointed out which make them to be otherwise. The onus probandi is here transferred from the Subject to the Prince. The Subject is not at any time to shew the grounds of his conduct. When the Sovereign or Magistrates think proper to exert themselves, it is their business to find out and produce the law in their own favour, and the prohibition against the Subject.

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• I shall take the liberty to mention another sact respecting myself, as it may serve to elucidate the above observations: or at least my manner of expressing them. I remember when I was beginning to pay attention to the operations of the English Government, I was under a prepossession of quite a contrary nature to that of the Gentleman whose opinions have been above discussed: I used to take it for granted that every article of liberty the Subject enjoys in this Country, was grounded upon some positive law by which this liberty was insured to him. In regard to the freedom of the press I had no doubt but it was so and that there existed

This kind of law principle, owing to the general spirit by which all parts of the Government are influenced, is even carried so far that any quibble, or trifling circumstance, by which an Offender may be enabled to step aside and escape, though ever so narrowly, the reach of the law, are sufficient to screen him from pu-

fome particular law, or rather feries of laws or legislative paragraphs, by which this freedom was defined and carefully fecured: and as the liberty of writing happened at that time to be carried very far, and to excite a great deal of attention (the noise about the Middlesex election had not yet subsided), I particularly wished to see those laws I supposed, not doubting but there must be something remarkable in the wording of I looked into those law books I had opportunities to come at, fuch as Jacob's and Cunningham's Law Dictiona. ries, Wood's Institutes, and Judge Blackstone's Commentaries. I also found means to have a fight of Comyn's Digest of the Laws of England, and I was again disappointed: this Author, though this Work confifts of five folio Volumes, had not had, any more than the Authors just mentioned, any room to spare for the interesting law I was in search of. At length it occurred to me, though not immediately, that this Liberty of the press was grounded upon its not being prohibited,—that this want of prohibition was the fole, and at the fame time folid, foundation of it. This led me, when I afterwards thought of writing fomething upon the Government of this Country, to give the definition of the freedom of the press which is contained in p. 288, 289: adding to it the important confideration of all actions respecting publications being to be decided by a Jury.

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nishment, let the immorality or intrinsic guilt of his conduct be ever so openly admitted \*.

Such a narrow circumscription of the exertions of the Government, is very extraordinary: it does not exist in any Country but this; nor could it. The situation of other Governments is such that they cannot thus allow themselves to be shut out of the unbounded space unoccupied by any law, in order to have their motions confined to that spot which express and previously declared provisions have chalked out. The power of these Governments being constantly attended with more or less precariousness, there must be a degree of discretion answerable to it †.

The

\* A number of instances, some even of a ludicrous kind, might be quoted in support of the above observation. Even only a trifling slaw in the words of an Indictment, is enough to make it void. The reader is also referred to the fact mentioned in the note, p. 176, and to that in p. 308, 309, of this Work.

I do not remember the name of that party Writer who, having published a treasonable writing in regard to which he escaped punishment, used afterwards to answer to his friends, when they reproached him with his rashness, I know I was writing within an inch of the gallows. The law being both ascertained and strictly adhered to, he had been enabled to bring his words and positions so nicely within compass.

+ It might perhaps also be proved, that the great lenity used in England in the administration of criminal justice, both

The foundation of that law principle, or doctrine, which confines the exertion of the power of the Government to fuch cases only as are expresfed by a law in being, was laid when the Great Charter was paffed: this reftriction was implied in one of those general impartial articles which the Barons united with the People to obtain from the The Crown, at that time, derived Sovereign. from its foreign dominions, that stability and inward strength in regard to the English Nation, which is now in a fecret hidden manner annexed to the Civil branch of its Office, and which, though operating by different means, continues to maintain that kind of confederacy against it, and union between the different Orders of the People. By the article Magna Charta here alluded to, the Sovereign bound itself neither to go, nor fend, upon the Subject, otherwise than by the Trial of Peers, and the Laws of the land \*. This article

in regard to the mildness, and to the frequent remitting, of punishments, is effentially connected with the same circumstance of the stability of the Government. Experience shews that it is needless to use any great degree of harshness and severity in regard to Offenders; and the Supreme governing authority is under no necessity of shewing the subordinate Magistracies any bad example in that respect.

\* . . . Nec super eum ibimus, nec super eum mittemus, nist per legale judicium pariam vel per legem terræ. Cap. XXIX. was however afterwards difregarded in practice. in consequence of the lawful efficiency which the King claimed for his Proclamations, and especially by the institution of the Court of Star Chamber. which grounded its proceedings not only upon these Proclamations, but also upon the particular rules it chose to frame within itself. By the abolition of this Court (and also of the Court of High Commission) in the reign of Charles the First, the above provision of the Great Charter was put in actual force; and it has appeared by the event, that the very extraordinary restriction upon the governing authority we are alluding to, and its execution, are no more than what the intrinsic situation of things, and the strength of the Constitution, can bear .

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• The Court of Star Chamber was like a Court of Equity in regard to criminal matters; it took upon itself to decide upon those cases of offence upon which the usual Courts
of Law, when uninfluenced by the Crown, refused to decide
either on account of the silence of the laws in being, or of the
particular rules they had established within themselves: which
is exactly the office of the Court of Chancery (and the Exchequer) in regard to matters of property. (See back, p.
135.) The great usefulness of Courts of this kind, has caused the Courts of Equity in regard to civil matters, to be supported and continued; but experience has shewn, as is above
observed, that no essential inconvenience can arise from the
Subject being indulged with the very great freedom he has
acquired

The law doctrine we have above described. and its being strictly regarded by the High governing authority, I take to be the most characteristic circumstance in the English Government. and the most pointed proof that can be given of the true freedom which is the confequence of its The practice of the Executive authority thus to fquare its motions upon fuch laws, and fuch only, as are afcertained and declared beforehand, cannot be the refult of that kind of stability which the Crown might derive from being fupported by an armed force, or as the above mentioned Author has expressed it, from the Sovereign being the General of an army: fuch a rule of acting is even contradictory to the office of a General: the operations of a General eminently depend for their fuccess, on their being fudden, unforeseen, attended by surprize,

In general, that stability of the power of the English Crown we have described, cannot be the result of that kind of strength which arises from an armed force: the kind of strength which is conferred by such a weapon as an army, is too uncertain, too complicate, too liable to accidents: in a word, it falls infinitely short of that degree of steadiness which is necessary to counterbalance,

acquired by the total abolition of all arbitary or provisional Courts in regard to criminal matters.

and at last quiet, those extensive agitations in the People which sometimes seem to threaten the destruction of order and Government. An army, if its support be well directed, may be useful to prevent this restlessness in the People from beginning to exist; but it cannot keep it within bounds, when it has once taken place.

If from general arguments and confiderations, we pass to particular facts, we shall actually find that the Crown, in England, does not rely for its support, nor ever has relied, upon the army of which it has the command. From the earliest times, that is, long before the invention of standing armies among European Princes, the Kings of England possessed an authority certainly as full and extensive as that which they do now enjoy. After the weight they derived from their possesfions beyond fea had been loft, a certain arrangement of things began to be formed at home, which supplied them with a strength of another kind, though not less folid: and they began to derive from the Civil branch of their regal Office that fecure power which no other Monarchs had ever possessed, except through the assistance of Legions and Prætorian guards, or of armies of Janissaries, or of Strelitzes.

The Princes of the house of Tudor, to speak of a very remarkable period in the English His-

tory, though they had no other visible present force than inconsiderable retinues of servants, were able to exert a power equal to that of the most absolute Monarchs who ever did reign, equal to that of the Domitians or Commoduses, or of the Amuraths or Bajazets: nay, it even was superior, if we consider the slow steadiness and outward show of legality with which it was attended throughout.

The stand which the Kings of the House of Stuart were able to make, though unarmed, and only supported by the civil authority of their Office, during a long course of years, against the restless spirit which began to actuate the Nation, and the vehement political and religious notions that broke out in their time, is still more remarkable than even the exorbitant power of the Princes of the House of Tudor, during whose reign prepossessions of quite a contrary nature were universal.

The struggle opened with the reign of James the First; yet, he peaceably weathered the beginning storm, and transmitted his authority undimished to his son. Charles the First was indeed at last crushed under the ruins of the Constitution: but if we consider that, after making the important national concessions contained in the Petition of Right, he was able, single and unarm-

ed, to maintain his ground without loss or read danger during a space of eleven years, that is, till the year 1640 and those that followed, we shall be inclined to think that, had he been better adwised, he might have avoided the missortunes that befel him at length.

Even the events of the reign of James the Second afford a proof of that folidity which is annexed to the authority of the English Crown. Notwithstanding the whole Nation, not excepting the army, where in a manner unanimous against him, was able to reign full four years, standing single against all, witiout meeting with any open resistance. Nor was such justifiable and necessary resistance easily brought about at length\*. Though it is not to be doubted that the dethroning of

• Mr. Hume is rather too anxious in his wish to exculpate James the Second. He begins the conclusive character he gives of him, with representing him as a Prince whom we may fafely pronounce more unfortunate than criminal. If we consider the solemn engagements entered into, not by his predecessors only, but by himself, which this Prince endeavoured to break, how cool and deliberate his attack on the liberties and religion of the People was, how unprovoked the attempt, and in short how totally destitute he was of any plea of self-defence or necessity, a plea to which most of the Princes who have been at variance with their Subjects had some fort of more or less distant claim, we shall look upon him as being perhaps the guiltiest Monarch that ever existed.

James the Second would have been affected in the iffue, and perhaps in a very tragical manner, yet, if it had not been for the affiftance of the Prince of Orange, the event would certainly have been postponed till a few years later. That authority on which James relied with so much confidence, was not annihilated at the time it was, otherwise than by a ready and considerable armed force being brought against it from the other side of the Sea, like a solid Fortress, which, though without any visible out-works, requires, in order to be compelled to surrender, to be battered with cannon.

If we look into the manner in which this Country has been governed fince the Revolution, we shall evidently see that it has not been by means of the army the Crown has under its command, that it has been able to preserve and exert its authority. It is not by means of their Soldiers that the Kings of Great Britain prevent the manner in which elections are carried on, from being hurtful to them; for, these Soldiers must move from the places of election one day before such elections are begun, and not return till one day after they are finished. It is not by means of their military force that they prevent the several kinds of civil Magistracies in the Kingdom from invading and lessening their prero-

gative; for this military force is not to act till called for by these latter, and under their direction. It is not by means of their army that they lead the two Branches of the Legislature into that respect of their regal authority we have before described; since each of these two Branches, severally, is possessed with an annual power of disbanding this army \*.

There is another circumstance, which, abstractedly of all others, makes it evident that the executive authority of the Crown is not supported by the army: I mean the very singular subjection in which the military is kept in regard to the civil power in this Country.

In a Country where the governing authority in the State is supported by the army, the military profession, who in regard to the other professions, have on their side the advantage of present force, being now moreover countenanced by the law, immediately acquire, or rather assume, a general ascendency; and the Sovereign, far

\* The generality of the People have from early times been so little accustomed to see any display of force used to influence the debates of the Parliament, that the attempt made by Charles the First to seize the sive Members, attended by a retinue of about two hundred Servants, was the actual spark that set in a blaze the heap of combustibles which the preceding contests had accumulated. The Parliament, from that sact, took a pretence to make military preparations in their turn; and then the civil war began.

from wishing to discourage their claims, feels an inward happines in seeing that instrument on which he rests his authority, additionally strengthened by the respect of the People, and receiving a kind of legal sanction from the general outward consent.

And not only the military profession at large, but the individuals belonging to it, also claim personally a pre-eminence: chief Commanders, Officers, Soldiers or Janissaries, all claim in their own spheres, some fort of exclusive privilege: and these privileges, whether of an honorisic, or of a more substantial kind, are violently afferted, and rendered grievous to the rest of the Community, in proportion as the affistance of the military force is more evidently necessary to, and more frequently employed by, the Government. These things cannot be otherwise.

Now, if we look into the facts that take place in England, we shall find that a quite different order prevails from what is above described. All Courts of a military kind are under a constant subordination to the ordinary Courts of Law. Officers who have abused their private power, though only in regard to their own Soldiers, may be called to account before a Court of Common Law, and compelled to make proper satisfaction. Even any flagrant abuse of authority committed

by Members of Courts Martial, when fitting to judge their own people, and determine upon cases of a bare military kind, makes them liable to the animadversion of the civil judge \*.

To

• A great number of inflances might be produced to prove the above mentioned subjection of the Civil to the Military power. I shall introduce one which is particularly remarkable: I meet with it in the periodical publications of the year 1746.

A Lieutenant of Marines, whose name was Frye, had been charged, while in the West Indies, with contempt of orders, for having refused, when ordered by the captain, to affift another Lieutenant in carrying another Officer prisoner on board the Ship: the two Lieutenants wanted to have the Captain give the order in writing. For this Lieutenant Frys was tried at Jamaica by a Court Martial, and fentenced to fifteen years imprisonment, besides being declared incapable of serving the King. He was brought home : and his case, after being laid before the Privy Council appearing in a justifiable light, he was released. Some time after he brought an action against Sir Chaloner Ogle, who had fat as Prefident to the above Court Martial, and had a verdict in his favour for one thousand pounds damages (it was also proved that he had been kept fourteen months in the most fevere confinement before hs was brought to his Trial.) The Judge moreover informed him that he was at liberty to bring his action against any of the Members of the said Court Martial he could meet with. The following part of the affair is still more remarkable.

Upon application made by Lieutenant Frys, Sir John Willes, Lord Chief Justice of the Common Pleas, issued

nence of the Civil over the Military Power at large,

his Writ against Admiral Mayne, and Captain Rentones two of the persons who had sat in the above Court Martial, who happened to be at that time in England, and were Members of the Court Martial that was then fitting at Deptford, to determine on the affair between Admirals Matthews and Leftock, of which Admiral Mayne was moreover Prefident; and they were arrested immediately after the breaking up of the Court. The other Members refented highly what they thought the infult: they met twice on the subject: and came to certain Resolutions, which the Judge Advocate was directed to deliver to the Board of Admiralty, in order to their being laid before the King. In these resolutions they demanded " fa-" tisfaction for the high infult on their President, from all per-" fons, how high soever in office, who have fet on foot this ar-" rest, or in any degree advised or promoted it."-Moreover complaining, that by the faid arreft, " the order, discipline, " and government of his Majesty's armies by Sea was dif-" folved, and the Statute 13 Car. II. made null and void."

The altercations on that account lasted some months. At length the Court Martial thought it necessary to submit; and they sent to Lord Chief Justice Willes, a letter signed by the seventeen Officers, Admirals and Commanders, who composed it, in which they acknowledged that "the resolution of the 16 and 21 May were unjust and unwarrantable, and do ask pardon of his Lordship, and the whole Court of Common Pleas, for the indignity offered to him and the Court."

This letter Judge Willes read in the open Court, and directed the same to be registered in the Remembrance Office, " as a "memorial to the present and future ages, that whoever set themselves

large, it is needless to add that all offences committed by persons of the military profession, in regard to individuals belonging to the other classes of the People, are to be determined upon by the Civil Judge. Any use they may make of their force, unless expressly applied to, and directed by the Civil Magistrate, let the occasion be what it may, makes them liable to be convicted of murder for any life that may have been loft. Pleading the duties or customs of their profession in extenuation of any offence, is a plea which the Judge will not fo much as understand. Whenever claimed by the Civil power, they must be delivered up immediately. Nor can it, in general be faid, that the countenance shewn to the military profession by the Ruling power in the State, has conftantly been fuch as to inspire the bulk of the people with a disposition tamely to bear their acts of oppression, or to raise in Magiftrates and Juries any degree of prepoffession fufficient to lead them always to determine with partiality in their favour \*.

The

<sup>&</sup>quot; themselves above the Law, will, in the end, find themselves "mistaken." The letter from the Court Martial, together with Judge Willes's acceptation, were inserted in the next Gazette, 15th November 1746.

<sup>\*</sup> The Reader may see in the publications of the year

The subjection of the Military to the Givil power, carried to that extent it is in England, is another characteristic and distinctive circumstance in the English Government.

It is fufficiently evident that a king does not look to his army for his support, who takes so little pains to bribe and unite it to his interest.

In general, if we consider all the different circumstances in the English Government, we shall find that the army cannot possibly procure to the Sovereign any permanent strength, any strength upon which he can rely, and from it expect the success of any future and distant meafures.

The public notoriety of the Debates in Parliament, induces all individuals, Soldiers as well as others, to pay fome attention to political fubjects: and the liberty of speaking, printing, and intriguing, being extended to every order of the Na-

in the army (Gen. Ganfell) having availed himself of the vicinity of his soldiers to prevent certain Sheriff's Officers from executing an arrest upon his person, at Whitehall. It however appeared that the General had done nothing more than put forth a few of his Men in order to perplex and astonish the Sheriff's Officers; and in the mean time he took an opportunity for himself to slip out of the way. The violent clamour we mention was no doubt owing to the party spirit of the time; but it nevertheless shews what the notions of the bulk of the People were on the subject.

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tion

tion by whom they are furrounded, makes them liable to imbibe every notion that may be directly contrary to the views of that Power which keeps them.

The case would be still worse if the Sovereign was engaged in a contest with a very numerous part of the Nation. The general concern would increase in proportion to the vehemence of the Parliamentary debates: Individuals, in all the different classes of the Public, would try their eloquence on the fame fubjects; and this eloquence would be in great measure exerted, during fuch interesting times, in making converts of the Soldiery: thefe evils the Sovereign could not obviate, nor even know, till it should be in every respect too late. A Prince engaged in the contest we suppose, would scarcely have completed his first preparations,—his project would scarcely be half ripe for execution, before his army would be taken from him. And the more powerful this army might be, the more adequate, feemingly, from its numbers, to the talk it is intended for, the more open it would be to the danger we mention.

Of this, James the Second made a very remarkable experiment. He had augmented his army to the number of thirty thousand. But when the day finally came in which their support was to have been useful to him, some deserted to the enemy; others threw down their arms; and those who continued to stand together, shewed more inclination to be Spectators of, than agents in, the contest. In short, he gave all over for lost, without making any manner of trial of their assistance \*.

From

\* The army made loud rejoicings on the day of the acquittal of the Bishops, even in the presence of the King, who had purposedly repaired to Hounslow Heath on that day. He had not been able to bring a single regiment to declare an approbation of his measures in regard to the Test and penal Statutes. The celebrated ballad Lero lero lillibuseru, which is reported to have had such an instrucce on the minds of the people at that time, and of which bishop Burnet says, "never perhaps so slight a thing had so great an effect" originated in the army: "the whole army, and at last People both in "City and Country, were perpetually singing it."

To a King of England engaged in a project against public liberty, a numerous army ready formed before hand, must, in the present situation of things, prove a very great impediment; he cannot possibly give his attention to the proper management of it: the less so, as his measures for that purpose must often be contradictory to those he is to pursue with the rest of the People.

If a King of England, wishing to set aside the present Constitution, and to assimilate his power to that of the other Sovereigns of Europe, was to do me the honour to consult me as to the means of obtaining success, I would recommend to him, as his first preparatory step, and before his real project is even suspected, to disband his army, keeping only a

From all the facts before introduced, it is evident that the power of the Crown, in England, bears upon foundations that are quite peculiar to it, and that its fecurity and strength are obtained by means totally different from those by which the same advantages are so incompletely procured, and so deeply payed for in other Countries.

It is without the affistance of an armed force that the Crown, in England, is able to manifest that fearlessness of particular individuals, or whole classes of them, with which it discharges its legal functions and duties. It is without the affistance of an armed force, it is able to counterbalance

ftrong guard, not exceeding twelve hundred Men. This done, he might, by means of the weight and advantages of his place, fet himself about undermining such constitutional laws as he dislikes: using as much temper as he can, that he may have the more time to proceed. And when at length things should be brought to a criss, then I would advise him to form another army, out of those friends or class of the People whom the turn and incidents of the preceding contests, will have linked and rivetted to his interest: with his army he might now take his chance: the rest would depend on his generalship; and even in a great measure on his bare reputation in that respect.

This advice to the King of England I suppose; I would, however conclude with observing to him, that his situation is as advantageous to the full, as that of any King upon earth, and upon the whole, that all the advantages that can possibly arise from the success of his plan, cannot make it worth his while to undertake it.

the extensive and unrestrained freedom of the People, it is able to exert that resisting strength which constantly keeps increasing in a superior proportion to the force by which it is opposed, that ballasting power by which, in the midst of boisterous winds and gales, it recovers and rights again the Vessel of the State.

It is from the Civil branch of its Office the Crown derives that strength by which it subdues even the Military power, and keeps it in a state of subjection to the Laws, unexampled in any other Country. It is from an happy arrangement of things it derives that uninterrupted steadiness, that invisible solidity, which procures to the Subject both so certain a protection, and so extensive a freedom. It is from the Nation it receives the force with which it governs the Nation, Its resources are accord, and not compulsion,—free action, and not fear,—and it con-

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tinues

<sup>\*</sup> There is a number of circumstances in the English Government which those persons who wish for speculative meliorations, such as Parliamentary reform, or other changes of a like kind, do not perhaps think of taking into consideration. If so, they are, in their proceedings, in danger of meddling with a number of strings, the existence of which they do not suspect. While they only mean reformation and improvement, they are in danger of removing the Talisman on which the existence of the Fabrick depends, or, like King Nisus daughter, of cutting off the fatal hair with which the fate of the city is connected.

continues to reign through the play, the struggle, of the voluntary passions of those who pay obedience to it.

#### CHAP. XVIII.

How far the examples of Nations who have lost their liberty, are applicable to England.

Who have treated these subjects, containing within itself the efficient cause of its ruin, a cause which is essentially connected with those very circumstances that had produced its prosperity, the advantages attending the English Government cannot therefore, according to these Writers, exempt it from that hidden defect which is secretly working its ruin; and M. de Montesquieu, giving his opinion both on the effect and the cause, says the English Constitution will lose its liberty, will perish: "Have not Rome, La-" cedæmon, and Carthage, perished? It will perish when the Legislative power shall have become more corrupt than the Executive."

\* Many persons, satisfied with seeing the elevation and upper parts of a building, think it immaterial to give a look under ground, and notice the foundation. Those Readers therefore who choose, may consider the long Chapter that has just been concluded as a kind of foreign digression, or parenthesis, in the course of the Work.

Though

Though I do by no means pretend that any human establishment can escape the fate to which we see every thing in Nature is subject, nor am so far prejudiced by the sense I entertain of the great advantages of the English Government, as to reckon among them that of eternity; I will however observe in general, that, as it differs by its ftructure and refources from all those with which History makes us acquainted, fo it cannot be faid to be liable to the fame dangers. To judge of the one from the other, is to judge by analogy where no analogy is to be found; and my respect for the author I have quoted will not hinder me from faying, that his opinion has not the fame weight with me on this occasion, that it has on many others.

Having neglected, as indeed all fystematic Writers upon Politics have done, very attentively to enquire into the real foundations of Power, and of Government, among Mankind, the principles he lays down are not always so clear, or even so just, as we might have expected from a Man of so true a genius. When he speaks of England, for instance, his observations are much too general: and though he had frequent opportunities of conversing with Men who had been personally concerned in the public affairs of this Country, and he had been himself an eye-witness of the

operations of the English Government, yet, when he attempts to describe it, he rather tells us what he conjectured than what he faw.

The examples he quotes, and the causes of diffolution which he assigns, particularly confirm this observation. The Government of Rome, to fpeak of the one which, having gradually, and as it were of itself, fallen to ruin, may afford matter of exact reasoning, had no relation to that of England. The Roman People were, not, in the latter ages of the Commonwealth, a People of Citizens, but of Conquerors. Rome, was not a state, but the head of a state. By the immensity of its conquests, it came in time to be in a manner only an accessory part of its own Empire. Its power became fo great, that, after having conferred it, it was at length no longer able to refume it: and from that moment it became itself subjected to it, from the same reason that the Provinces themselves were fo.

The fall of Rome, therefore, was an event peculiar to its fituation; and the change of manners which accelerated this fall, had also an effect which it could not have had but in that fame fituation. Men who had drawn to themselves all the riches of the World, could no longer content themselves with the supper of Fabricius, and the cottage of Cicinnatus. The People, who were masters

masters of all the corn of Sicily and Africa, were no longer obliged to plunder their neighbours for their's. All possible Enemies, besides, being exterminated, Rome, whose power was military, became to be no longer an army; and that was the æra of her corruption; if, indeed, we ought to give that name to what was the inevitable consequence of the nature of things.

In a word, Rome was destined to lose her Liberty when she lost her Empire, and she was destined to lose her Empire, whenever she should begin to enjoy it.

But England forms a Society founded upon principles' absolutely different. All liberty and power are not accumulated as it were on one point, so as to leave, every where else, only slavery and mifery, confequently only feeds of division and fecret animolity. From the one end of the island to the other the same laws take place, and the same interests prevail: the whole Nation, besides, equally concurs in the formation of the Government: no part, therefore, has cause to fear that the other parts will fuddenly fupply the neceffary forces to destroy its liberty: and the whole have, of course, no occasion for those ferocious kinds of virtue which are indispensibly necessary to those who, from the situation in which they have brought themselves, are continually exposed

exposed to such dangers, and after having invaded every thing, must abstain from every thing.

The fituation of the People of England, therefore, effentially differs from that of the People of Rome. The form of the English Government does not differ less from that of the Roman Republic: and the great advantages it has over the latter preserving the liberty of the People from ruin, have been described at length in the course of this Work.

Thus, for instance, the total ruin of the Roman Republic was principally brought about by the exorbitant power to which feveral of its Citizens were fuccessively enabled to rife. In the latter age of the Commonwealth, those Citizens went fo far as to divide among themselves the dominions of the Republic in much the fame manner as they might have done lands of their own. And to them others in a short time succeeded, who not only did the fame, but who even proceeded to that degree of tyrannical infolence, as to make cessions to each other, by express and formal compacts, of the lives of thousands of their Fellow-citizens. But the great and constant authority and weight of the Crown, in England, prevent, in their very beginning, as we have feen, all misfortunes of this kind; and the reader may

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recollect what has been faid before on that fubject.

At last the ruin of the Republic, as every one knows, was completed. One of those powerful Citizens we mention, in process of time found means to exterminate all his competitors: he immediately assumed to himself the whole power of the State; and established for ever after an arbitrary Monarchy. But such a sudden and violent establishment of a Monarchical power, with all the fatal consequences that would result from such an event, are calamities which cannot take place in England; that same kind of power we see, is already in being; it is ascertianed by fixed laws, and established upon regular and well-known foundations.

Nor is there any great danger that that power may, by means of those legal prerogatives it already possesses, suddenly assume others, and at last openly make itself absolute. The important privilege of granting to the Crown its necessary supplies, we have before observed, is vested in the Nation: and how extensive soever the prerogatives of a King of England may be, it constantly lies in the power of his People either to grant, or deny him, the means of exercising them.

This right possessed by the People of England, constitutes the great difference between them, them, and all the other Nations that live under Monarchical Governments. It likewife gives them a great advantage over fuch as are formed into Republican States, and confers on them a means of influencing the conduct of the Government, not only more effectual, but also (which is more in point to the fubject of this Chapter) incomparably more lafting and fecure than those reserved to the People, in the States we mention.

In those States, the political rights which usually fall to the share of the People, are those of voting in general Affemblies, either when laws are to be enacted, or Magistrates to be elected. But as the advantages arising from these general rights of giving votes are never very clearly afcertained by the generality of the People, fo neither are the consequences attending particular forms or modes of giving these votes, generally and completely understood. They accordingly never entertain any strong and constant preference for one method rather than another; and it hence always proves but too eafy a thing in Republican States, either by infidious propofals made at particular times to the People, or by well contrived precedents, or other means, first to reduce their political privileges to mere ceremonies and forms, and at last, entirely to abolish them.

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Thus, in the Roman Republic, the mode which was constantly in use for about one hundred and fifty years, of dividing the Citizens into Centuriæ when they gave their votes, reduced the right of the greater part of them, during that time, to little more than a shadow. After the mode of dividing them by Tribes had been introduced by the Tribunes, the bulk of the Citizens indeed were not, when it was used, under so great a disadvantage as before; but yet the great privileges exercised by the Magistrates in all the public affemblies, the power they affumed of moving the Citizens out of one Tribe into another, and a number of other circumstances, continued to render the rights of the Citizens more and more ineffectual; and in fact we do not find that when those rights were at last entirely taken from them, they expressed any very great degree of discontent.

In Sweeden (the former Government of which partook much of the Republican form) the right allotted to the People in the Government, was that of sending Deputies to the General States of the Kingdom, who were to give their votes on the resolutions that were to be taken in that Assembly. But the privilege of the People of sending such Deputies was, in the first place, greatly diminished by several effential disadvantages under which

which these Deputies were placed with respect to the body, or Order, of the Nobles. The fame privilege of the People was farther lesfened by their Deputies being deprived of the right of freely laying their different proposals before the States, for their affent or diffent, and attributing the exclusive right of framing such proposals, to a private Assembly which was called the Secret Committee. Again, the right allowed to the Order of the Nobles, of having a number of Members in this Secret Committee double to that of all the other Orders taken together, rendered the rights of the People still more ineffectual. the last Revolution those rights we mention have been in a manner taken from the People; and they do not feem to have made any great effort to preserve them \*.

But the fituation of affairs in England is totally different from that which we have just defcribed. The political rights of the People are inseparably connected with the right of Property—

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<sup>\*</sup> I might have produced examples of a number of Republican States in which the People have been brought, at one time or other, to submit to the loss of their political privileges. In the Venetian Republic, for instance, the right, now exclusively vested in a certain number of families, of enacting laws, and electing the Doge and other Magistrates, was originally vested in the whole People.

with a right which it is as difficult to invalidate by artifice, as it is dangerous to attack it by force, and which we fee that the most arbitrary Kings, in the full career of their power, have never offered to violate without the greatest precautions. A King of England who would enslave his People, must begin with doing, for his first act, what all other Kings reserve for the last; and he cannot attempt to deprive his Subjects of their political privileges, without declaring war against the whole Nation at the same time, and attacking very individual at once in his most permanent and best understood interest.

And that means possessed by the People of England, of influencing the conduct of the Government, is not only in a manner secure against any danger of being taken from them: it is moreover attended with another advantage of the greatest importance; which is that of conferring naturally, and as it were necessarily, on those to whom they trust the care of their interests, the great privilege we have before described, of debating among themselves whatever questions they think conducive to the good of their Constituents, and of framing whatever bill they think proper, and in what terms they choose.

This privilege of starting new subjects of deliberation, and, in short, of propounding in the busi-

ness of legislation, which, in England, is allotted to the Representatives of the People, sets another capital difference between the English Constitution, and the government of other free States, whether limited Monarchies or Commonwealths, and prevents that which, in those States, proves a most effectual means of subverting the laws favourable to public liberty: I mean the undermining of these laws by the precedents and artful practices of those who are invested with the Executive Power in the Government.

In the States we mention, the active share, or the business of propounding, in legislation, being ever alloted to those persons who are invested with the Executive authority, they not only poffefs a general power, by means of infidious and well timed propofals made to the People, of getting those laws repealed which fet bounds to their authority; but when they do not choose openly to discover their wishes in that respect. or perhaps even fear to fail in the attempt, they have another refource, which, though flower in its operation, is not less effectual in the issue. They neglect to execute those laws which they diflike, or deny the benefit of them to the feparate straggling individuals who claim them, and in short introduce practices that are directly derogatory to them. These practices in a courfe

course of time become respectable Uses, and at length obtained the force of Laws.

The People even where they are allowed a fhare in legislation, being ever passive in the exercise of it, have no opportunities of framing new provisions by which to remove these spurious practices or regulations, and declare what the law in reality is. The only resource of the Citizens, in fuch a state of things, is either to be perpetually cavilling, or openly to oppose and always exerting themselves, either too soon, or too late, they cannot come forth to defend their liberty, without incurring the charge, either of difaffection, or of rebellion.

And while the whole class of Politicians, who are constantly alluding to the usual forms of limited Governments, agree in deciding that freedom, when once loft, cannot be recovered \*, it happens that the maxim principiis obsta, which they look upon as the fafeguard of liberty, and which they accordingly never cease to recommend, besides its requiring a degree of watchfulness incompatible with the fituation of the People, is in a manner impracticable.

But the operation of preferring grievances,

Hh 2 which

<sup>&</sup>quot; Ye free Nations, remember this maxim: Freedom " may be acquired, but it cannot be recovered." Rousseau's Social Compact, Chap. VIII.

which in other Governments is a constant forerunner of public commotions, that of framing new law remedies, which is so jealously secured to the Ruling power of the State, are in England, the constitutional and appropriated offices of the Representatives of the People.

How long foever the People may have remained in a state of supineness as to their most valuable interests, whatever may have been the neglect and even the errors of their Representatives, the instant the latter come either to see these errors, or to have a fense of their duty, they proceed, by means of the privilege we mention, to fet aside those abuses or practices which, during the preceding years, had become to hold the place of the laws. To how low foever a state public liberty may happen to be reduced, they take it where they find it, lead it back through the fame path, and to the fame point, from which it had been compelled to retreat; and the ruling power, whatever its usurpations may have been, how far foever it may have overflowed its banks, is ever brought back to its old limits.

To the exertions of the privilege we mention, were owing the frequent confirmations and elucidations of the great Charter that took place in different reigns. By means of the same privilege the Act was repealed, without public commotion, which had enacted that the King's proclamations

should

should have the force of law: by this Act public liberty feemed to be irretrievably loft; and the Parliament who passed it, seemed to have done what the Danish Nation did about a century af-The fame privilege procured the terwards. peaceable abolition of the Court of Star Chamber: a Court which, though in itself illegal, had grown to be fo respected through the length of time it had been fuffered to exist, that it seemed to have for ever fixed and rivetted the unlawful authority it conferred on the Crown. By the same means the power was fet aside which the Privy Council had affumed of imprisoning the Subject without admitting to bail, and even mentioning any cause: this power was in the first instance declared illegal by the Petition of Right; and the attempts of both the Crown and the Judges to invalidate this declaration by introducing, or maintaining, practices that were derogatory to it, were as after obviated in a peacable manners, by fresh declarations, and, in the end, by the celebrated Habeas Corpus Act \*.

And

<sup>\*</sup> The case of the General Warrants may also be mentioned as an instance. The issuing of such Warrants with the name of the persons to be arrested lest blank, was a practice that had been followed in the Secretaries of State's office for above sixty years. In a Government differently constituted, that is, in a Government in which the Magistrates, or Executive Power, should have been possessed of the Key of H h 3 Legisla

And I shall take this opportunity to make the Reader observe, n general, how the different parts of the English Government mutually assist and support each other. It is because the whole executive authority in the State is vested in the Crown, that the People may without danger delegate the care of their liberty to Representatives:—it is because they share in the Government only through these Representatives, that they are enabled to possess the great advantage arising from framing and proposing new laws: but for this purpose, it is again absolutely necessary that the Crown, that is to say, a Veto of extraordinary power, should exist in the State.

It is, on the other hand, because the balance of the People is placed in the right of granting to the Crown its necessary supplies, that the latter may, without danger, be intrusted with the great authority we mention; and that the right, for instance, which is vested in it of

Legislation, it is difficulty to say how the contest might have been terminated: these Magistrates would have been but indifferently inclined to frame and brin gforth a declaration yb which to abridge their assumed authority. In the Republic of Geneva, the Magistracy, instead of rescinding the judgment against M. Rousseau, of which the Citizens complained, had rather openly to avow the maxim, that standing Uses were valid derogations to the written Law, and ought to supersede it. This rendered the clamour more violent than before.

judging

judging of the proper time for calling and diffolving Parliaments (a right absolutely necesfary to its preservation) may exist without producing ipso facto, the ruin of public Liberty. The most singular Government upon Earth, and which has carried farthest the liberty of the individual, was in danger of total destruction, when Bartholomew Columbus was on his passage to England, to teach Henry the Seventh the way to Mexico and Peru \*.

As a conclusion of this subject (which might open a field for speculations without end) I shall take notice of an advantage peculiar to the English Government, and which, more than any other we could mention, must contribute to its duration. All the political passions of Mankind, if we attend to it, are satisfied and provided for in the English Government; and whether we look at the Monarchical, or the Aristocratical, or the Democratical, part of it, we find all those powers already settled in it in a regular manner, which have an unavoidable tendency to arise at one time or other, in all human Societies.

• As affairs are fituated in England, the diffolution of a Parliament on the part of the Crown, is no more than an appeal either to the People themselves, or to another Parliament.

If we could for an inftant suppose that the English form of Government, instead of having been the effect of a lucky concurrence of fortunate circumstances, had been established from a settled plan by a Man who had discovered, beforehand and by reasoning, all those advantages resulting from it which we now perceive from experience, and had undertaken to point them out to other Men capable of judging of what he said to them, the following is, most likely, the manner in which he would have expressed himsels.

- Nothing is more chimerical, he would have faid, than a state either of total equality, or total liberty, amongst Mankind. In all so-cieties of Men, some Power will necessarily arise. This Power, after gradually becoming confined to a smaller number of persons, will, by a like necessity, at last fall into the hands of a single Leader; and these two effects (of which you may see constant examples in History) arising from the ambition of the one part of Mankind, and from the various affections and passions of the other, are absolutely una-
- voidable.
  Let us, therefore, admit this evil at once,
  fince it is impossible to avoid it. Let us of
  ourselves, establish a Chief among us, since we
  must,

- must, some time or other, submit to one: we
- ' shall by this means effectually prevent the con-
- · flicts that would arise among the competitors for
- that station. But let us, above all, establish him
- fingle; left, after fuccessively raising himself on
- the ruins of his Rivals, he should finally esta-
- blish himself whether we will or not, and
- through a train of the most disadvantageous
- incident s
- Let us even give him every thing we can
- ' possibly give without endangering our security.
- Let us call him our Sovereign; let us make
- him confider the State as being his own patri-
- ' mony; let us grant him, in fhort, fuch perfonal
- privileges as none of us can ever hope to rival
- ' him in, and we shall find those things which we
- were at first inclined to consider as a great evil.
- will be in reality a fource of advantages to the
- · Community. We shall be the better able to set
- bounds to that Power which we shall have thus
- s afcertained and fixed in one place. We shall
- ' have the more interested the Man whom we
- ' shall have put in possession of so many advan-
- tages, in the faithful discharge of his duty. And
- we shall have thus procured for each of us, a
- f powerful protector at home, and for the whole
- · Community, a defender against foreign enemies,
  - ' fuperior

- fuperior to all possible temptation of betraying his Country.
- You may also have observed (he would
- continue), that in all States, there naturally
- arifes around the person, or persons, who are
- invested with the public power, a class of Men,
- who, without having any actual share in that
- power, yet partake of its luftre: who, pretend-
- ing to be diffinguished from the rest of the
- Community, do from that very circumstance,
- Community, do notif that very encumerance,
- become distinguished from it; and this distinc-
- ' tion, though only matter of opinion, and at first
- thus furreptitiously obtained, yet may become
- ' in time the fource of very grievous effects.
  - ' Let us therefore regulate this evil which we
- cannot entirely prevent. Let us establish this
- class of Men who would otherwise grow up
- ' among us without our knowledge, and gradu-
- ally acquire the most pernicious privileges.
- ' Let us grant them distinctions that are visible
- ' and clearly ascertained: their nature will by
- ' this means, be the better understood, and they
- will of course, be much less likely to become
- dangerous. By this means also, we shall pre-
- clude all other persons from the hopes of usurp-
- ing them. As, to pretend to distinctions can
- thenceforward be no longer a title to obtain
- them, every one who shall not be expressly
  - ' included

- Included in their number, must continue to
- confess himself one of the People; and just as
- we faid before, let us choose ourselves one
- Mafter that we may not have fifty, fo let us
- ' again fay here, let us establish three hundred
- Lords, that we may not have ten thousand
- · Nobles.
  - Besides, our pride will better reconcile itselt
- ' to a superiority which it will no longer think of
  - disputing. Nay, as they will themselves see us
  - to be before-hand in acknowledging it, they will think themselves under no necessity of
  - being insolent to furnish us a proof of it. Secure
  - as to their privileges, all violent measures on
  - their part for maintaining, and at last perhaps
  - extending them, will be prevented: they will
  - e never combine together with any degree of
  - vehemence, but when they really have cause to
  - think themselves in danger; and by having
  - ' made them indisputably great Men, we shall
- have a chance of often feeing them behave like
- ' modest and virtuous Citizens.
- In fine, by being united in a regular Affem-
- bly, they will form an intermediate Body in the
  - · State, that is to fay, a very useful part of the
- Government.
  - 'It is also necessary, our Lawgiver would
- farther add, that We, the People, should have
- an influence upon Government: it is necessary

- for our own fecurity; it is no less necessary for
- the fecurity of the Government itself. But
- experience must have taught you, at the same
- time, that a great body of Men cannot act.
- without being, though they are not aware of
- it, the inftruments of the designs of a small
- number of persons; and that the power of the
- · People is never any thing but the power of
- a few Leaders, who (though it may be impos-
- fible to tell when or how) have found means to
- fecure to themselves the directions of its exer-
- cife.
  - Let us, therefore, be also beforehand with
- this other inconvenience. Let us effect openly
- what would, otherwife, take place in fecret.
- Let us intrust our power, before it be taken
- from us by address. Those whom we shall
- have expressly made the depositaries of it, being
- freed from any anxious care about supporting
- themseves, will have no object but to render it
- ' useful. They will stand in awe of us the more
- because they will know that they have not im-
- posed upon us; and instead of a small number
- of Leaders, who would imagine they derive
- their whole importance from their own dex-
  - · terity, we shall have express and acknowledged
- Representatives, who will be accountable to us
- for the evils of the State.

tud ? . shoence upon Government: it is Recessary

But above all, by forming our Government

with a fmall number of perfons, we shall pre-

vent any disorder that may take place in it.

from ever becoming dangerously extensive.

Nay more, we shall render it capable of inesti-

mable combinations and refources, which would

be utterly impossible in that Government of

' all, which never can be any thing but uproar

. and confusion.

In short, by expressly divesting ourselves of

a power of which we should, at best, have

only an apparent enjoyment, we shall be entitled

to make conditions for ourselves, we will insist

that our liberty be augmented; we will above

all, referve to ourselves the right of watching

and censuring that administration which will

have been established by our own consent. We

fhall the better fee its faults, because we shall

be only Spectators of it: we shall correct them

the better, because we shall not have personally

concurred in its operations \*.'

The

<sup>\*</sup> He might have added,-" As we will not feek to counteract nature, but, rather to follow it, we shall be able

<sup>&</sup>quot; to procure to ourselves a mild Legislation. Let us not

<sup>&</sup>quot; be without cause afraid of the power of one Man; we

<sup>&</sup>quot; shall have no need either of a Tarpeian rock, or of a

<sup>&</sup>quot; Council of Ten. Having expressly allowed to the People

<sup>&</sup>quot; a liberty

The English constitution being founded upon such principles as those we have just described, no true comparison can be made between it, and the Governments of any other States; and since it evidently insures, not only by the liberty, but the general satisfaction in all respects, of those who are subject to it, in a much greater degree than any other Government ever did, this consideration alone affords sufficient ground to conclude, without looking farther, that it is also more likely to be preserved from ruin.

And indeed we may observe the remarkable manner in which it has been maintained in the midst of such general commotions as seemed unavoidably to prepare its destruction. It rose again, we see, after the wars between Henry the Third and his Barons; after the usurpation of Henry the Fourth; and after the long and bloody contentions between the Houses of York and Lancaster. Nay, though totally destroyed in appearance after the fall of Charles the First, and though the greatest efforts had been made to establish another form of government in its stead, yet, no sooner was Charles the Second called

<sup>&</sup>quot; a liberty to enquire into the conduct of Government, and

<sup>&</sup>quot; to endeavour to correct it, we shall need neither State-

<sup>&</sup>quot; prisons, nor secret Informers."

over, than the Constitution was re-established upon all its ancient foundations.

However, as what has not happened at one time, may happen at another, future Revolutions (events which no form of Government can totally prevent) may perhaps end in a different manner from that in which past ones have been terminated. New combinations may possibly take place among the then ruling Powers of the State, of fuch a nature as to prevent the Constitution, when peace shall be restored to the Nation, from fettling again upon its ancient and genuine foundations; and it would certainly be a very bold affertion to decide, that both the outward form, and the true spirit of the English Government, would again be preserved from destruction, if the same dangers to which they have in former times been exposed, should again happen to take place.

Nay, fuch fatal changes as those we mention, may be introducad even in quiet times, or at least, by means in appearance peaceable and constitutional. Advantages, for instance, may be taken by particular factions, either of the feeble temper, or of the misconduct, of some suture King. Temporary prepossessions of the People may be made use of, to make them concur in doing what will prove afterwards the ruin of their own liberty.

Plans

Plans of apparent improvement in the Conftitution, forwarded by Men who, though with good intentions, shall proceed without a due knowledge of the true principles and foundations of Government, may produce effects quite contrary to those which were designed, and in reality prepare its ruin \*. The Crown, on the other hand,

. Instead of looking for the principles of Politics in their true sources, that is to say, in the nature of the affections of Mankind, and of those fecret ties by which they are united together in a state of Society, Men have treated that science in the same manner as they did natural Philosophy in the times of Aristotle, continually recurring to occult causes, and principles, from which no useful consequence could be drawn. Thus, in order to ground particular affertions, they have much used the word Constitution, in a personal sense, the Conflitution loves, the Constitution forbids, and the like. At other times they have had recourse to Luxury, in order to explain certain events, and at others, to a still more occult cause, which they have called Corruption; and abundance of comparisons drawn from the human Body have been also used for the same purposes: continued instances of such defective arguments and confiderations occur in the Works of M. de Montesquieu; though a man of so much genius, and from whose writings so much information is nevertheless to be derived. Nor is it only the obscurity of the writings of Politicians, and the impossibility of applying their speculative Doctrines to practical uses, which prove that some peculiar and uncommon difficulties lie in the way of the investigation of political truths; but the remarkable perplexity which Men in general, even the ablest, labour under when they attempt

hand, may, by the acquisition of foreign domiminions acquire a satal independency on the People: and if, without entering into any farther particulars on this subject I were required to point out the principal events which would, if they were ever to happen, prove immediately the ruin of the English Government, I would say,—The English Government will be no more, either when the Crown shall become independent on the Nation for its supplies, or when the Representatives of the People shall begin to share in the Executive authority.

attempt to descant and argue upon abstract questions in politics, also justifies this observation, and proves that the true first principles of this Science, whatever they are, lie deep both in the human feelings and understanding.

And if at any time, any dangerous changes were to take place in the English Constitution, the pernicious tendency of which the People were not able at first to discover, restrictions on the Liberty of the Press, and on the Power of Juries, will give them the first information.

quainted was the King at that time with his own

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#### CHAP. XIX.

A few additional thoughts on the attempts that at particular times may be made to abridge the power of the Crown and some of the dangers by which such attempts may be attended.

THE power of the Crown is supported by deeper, and more numerous, roots, than the generality of people are aware of, as has been observed in a former Chapter; and there is no cause anxiously to fear that the wresting any capital branch of its prerogative, may be effected, in common peaceable times, by the mere theoretical speculations of Politicians. However, it is not equally impracticable that some event of the kind we mention may be brought about through a conjunction of feveral circumstances. Advantage may, in the first place, be taken of the minority, or even also the inexperience or the errors of the person invested with the kingly authority. Of this a remarkable inflance happened under the reign of King George the First, while that Bill, by which the number of Peers was in future to be limited to a certain number was under a confideration in the House of Commons, to whom it had been fent from that of the Lords, where it had been passed. So unacquainted was the King at that time with his own interest,

interest, and with the constitution of that Government over which he was come to preside, that having been persuaded by that party who wished success to the Bill, that the objection made against it by the House of Commons, was only owing to an opinion they entertained of the Bill being disagreeable to him, that he was prevailed upon to send a message to them, to let them know that such an opinion was ill-grounded, and that should the Bill pass in their House, it would meet with his affent \*. Considering the prodigious importance of the consequence of such a Bill, the sact is certainly very remarkable †.

With those personal disadvantages under which the Sovereign may lie for defending his authority, other causes of difficulty may concur:—such as popular discontents of long continuance in regard to certain particular abuses of influence or authority. The generality of the Public bent, at that time, both upon remedying the abuses that are complained of, and preventing the like from taking place in future, will perhaps wish to see that branch of the prerogative which gave rise to them, taken from the Crown: a general disposition to applaud such a measure, if effected,

<sup>\*</sup> See the Collection of Parliamentary Debates; I do not remember exactly what Volume.

<sup>†</sup> This Bill has been mentioned in page 384.

will be manifested from all quarters; and at the fame time Men may not be aware that the only material consequence that may arise from depriving the Crown of that branch of power which has caused the public complaints will perhaps be the having transposed that branch of power from its former seat to another, and having trusted it to new hands which will be still more likely to abuse it than those in which it was formerly lodged.

In general, it may be laid down as a maxim, that power under any form of Government, must exist, and be trusted somewhere. If the Constitution does not admit of a King, the governing authority is lodged in the hands of Magistrates. If the government, at the same time it is a limited one, bears a Monarchical form, those shares of power that are retrenched from the King's prerogative, most likely continue to subsist, and are vested in a Senate or Assembly of great Men, under some other name of the like kind.

Thus, in the Kingdom of Sweden, which, having been a limited Monarchy, may supply examples very applicable to the Government of this Country, we find that the power of convoking the General States (or Parliament) of that Kingdom had been taken from the Crown; but at the same time we also find that the Swedish Senators had invested themselves with that essential branch of power which the Crown had lost.—

I mean

I mean here to fpeak of the Government of Sweden as it stood before the last revolution.

The power of the Swedish King to confer offices and employments, had been also very much abridged. But what was wanting to the power of the King, the Senate enjoyed: it had the nomination of three persons for every vacant office, out of whom the king was to choose one.

The king of Sweden had but a limited power in regard to pardoning offenders; but the Senate likewise possessed what was wanting to that branch of his prerogative, and it appointed two persons, without the consent of whom the King could not remit the punishment of any offence.

The King of England has an exclusive power in regard to foreign affairs, war, peace, treaties;—in all that relates to military affairs; he has the disposal of the existing army, of the steet, &c. The King of Sweden had no such extensive powers; but they nevertheless existed: every thing relating to the above mentioned objects was transacted in the Assembly of the Senate; the majority decided; the King was obliged to submit to it; and his only privilege consisted in his vote being accounted two \*.

If

The Swedish Senate was usually composed of sixteen Members. In regard to affairs of smaller moment, they formed themselves into two divisions; in either of these when

If we pursue farther our enquiry on the subject, we shall find that the King of Sweden could not raise whom he pleased to the office of Senator, as the king of England can, in regard to the office of Member of the Privy Council; but the Swedish States, in the Assembly of whom the Nobility enjoyed most capital advantages, possessed a share of the power we mention, in conjunction with the King; and in cases of vacancies in the Senate, they elected three persons, out of whom the King was to return one.

The King of England may, at all times, deprive his Ministers of their employments. The

they did fit, the presence of seven Members was required for the effectual transacting of business: in affairs of importance, the assembly was formed of the whole Senate; and the presence of ten Members was required to give force to the resolutions. When the King could not, or would not take his seat, the Senate proceeded nevertheless, and the majority continued to be equally decisive.

As the Royal Seal was necessary for putting in execution the resolutions of the Senate, King Adolphus Frederic, father to the present King, tried by refusing to lend the same, to procure that power which he had not by his suffrage, and to stop the proceedings of the Senate. Great debates, in consequence of that pretension, arose, and continued for a while; but, at last, in the year 1756, the king was overruled by the Senate, who ordered a seal to be made, that was named the King's-Seal, which they affixed to their official resolutions, when the King resuled to lend his own.

King of Sweden could remove no Man from his office; but the States enjoyed the power that had been denied to the King; and they might deprive of their places both the Senators, and those persons in general who had a share in the Administration.

The King of England has the power of dissolving, or keeping assembled as long as he pleases, his Parliament. The King of Sweden had not that power; but the States might, of themselves prolong their duration as they thought proper.

Those persons who think that the prerogative of a King cannot be too much abridged, and that power loses all its influence on the dispositions and views of those who possess it, according to the kind of name used to express those offices by which it is conferred, may be fatisfied, no doubt, to behold those branches of power that were taken from a King, distributed to feveral Bodies, and shared in by the Representatives of the People: but those who think that Power, when parcelled and diffused, is never fo well repressed and regulated as when it is confined to a fole indivisible feat, that keeps the Nation united and awake,-those who know that, names by no means altering the intrinfic nature of things, the Representatives of the People, as foon as they are vested with independent autho-

rity,

rity, become ipso facto its Masters,—those persons, I say, will not think it a very happy regulation in the former Constitution of Sweden, to have deprived the King of Prerogatives formerly attached to his office, in order to vest the same either in a Senate, or in the Deputies of the People, and thus to have trusted with a share in the exercise of the public power, those very Men whose Constitutional office should have been to watch and restrain it.

To the indivisibility of the governing authority in England, the community of interest which takes place among all orders of Men, is owing; and from this community of interest rifes, as a necessary consequence, the liberty enjoyed by all ranks of subjects. This observation has been infifted upon at length in the course of this Work. The shortest reflection on the frame of the human heart, fuffices to convince us of its truth, and at the same time manifests the danger that would refult from making any changes in the form of the existing Government by which this general community of interest might be lessened,-unless we are at the fame time also determined to believe, that partial Nature forms Men in this Island, of quite other stuff than the felfish and ambitious

one of which she ever made them in other Countries \*.

But

• Such regulations as may capitally affect, through their consequences, the equipoise of a Government, may be brought about, even though the promoters themselves of those regulations are not aware of their tendency. At the same time the Bill was passed in the last century, by which it was enacted that the Crown should give up its prerogative of dissolving the Parliament then sitting, the generality of People had no thought of the calamitous consequences that were to follow: very far from it. The King himself certainly felt no very great apprehension on that account; else he would not have given his assent: and the Commons themselves, it appears, had but very faint notions of the capital changes which the Bill would speedily effect in their political situation.

When the Crown of Sweden was, in the first instance stripped of all the different prerogatives we have mentioned, it does not appear that those measures were effected by sudden, open provisions for that purpose : it is very probable they had been prepared by indirect regulations formerly made, the whole tendency of which scarcely any body perhaps could foresee at the time they were framed.

When the Bill was in agitation, that has been mentioned in page 384, and 483, by which the House of Peers was in suture to be limited to a certain number that was not to be exceeded, the great constitutional consequences of the Bill were scarcely attended to by any body. The King himself certainly saw no harm in it, since he sent an open message to promote the passing of it: a measure which I cannot say how far it was in itself regular. The Bill was, it appears, gene-

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But past experience does not by any means allow us to entertain so pleasing an opinion. The perusal of the History of this Country will shew us, that the care of its Legislators for the welfare of the subject, always kept pace with the exigencies of their own situation. When, through

rally approved out of doors. Its fate was for a long time doubtful in the House of Commons; nor did they acquire any glory with the bulk of the People by finally rejecting it : and Judge Blackstone, as I find in his Commentaries, does not feem to have thought much of the Bill and its being rejected, as he only observes that the Commons " wished to keep the door of the House of Lords as open as possible." Yet, no Bill of greater conftitutional importance was ever agitated in Parliament; fince the consequences of its being passed, would have been the freeing the House of Lords, both in their Judicial and Legislative capacities, from all constitutional check whatever, either from the Crown, or the Nation. Nay, it is not to be doubted they would have acquired, in time, the right of electing their own Members : though it would be useless to point out here by what series of intermediate events the measure might have been brought about. Whether there existed any actual project of this kind among the first framers of the Bill, does not appear: but a certain number of the Members of the House we mention, would have thought of it foon enough, if the Bill in question had been enacted into a law; and they would certainly have met with fuccess, had they been but contented to wait, and had they taken time. Other equally important changes in the substance, and perhaps the outward from, of the Government, would have followed.

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the minority, or easy temper of the reigning Prince, or other circumstances, the dread of a fuperior Power began to be overlooked, the public cause was immediately deserted in a greater or less degree, and pursuit after private influence and lucrative offices took the place of patriotism. When, under the reign of Charles the First, the authority of the Crown was for a while utterly annihilated, those very Men who, till then, had talked of nothing but Magna Charta and Liberty, instantly endeavoured openly to trample both under foot.

Since the time we mention, the former Constitution of the Government having been restored, the great outlines of public liberty have indeed been warmly and feriously defended: but if any partial unjust laws or regulations have been made, especially since the Revolution of the year 1689, if any abuses injurious to particular classes of individuals have been suffered to continue (facts into the truth of which I do not propose to examine here), it will certainly be found upon enquiry, that those laws and those abuses were such as that from them the Members of the Legislature well knew, that neither they, nor their friends, would ever be likely to fuffer.

If through the unforeseen operation of some new regulation made to restrain the royal prerogative,

rogative, or through some sudden public revosolution, any particular bodies or classes of individuals were ever to acquire a personal independent share in the exercise of the governing authority, we should behold the public virtue and patriotism of the Legislators and Great Men immediately cease with its cause, and Aristocracy, as it were watchful of the opportunity, burst out at once, and spread itself over the Kingdom,

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The Men who are now the Ministers, then the Partness of the Crown, would instantly set themselves above the reach of the law, and soon after ensure the same privilege to their several supporters or dependents.

Personal and independent power being become the only kind of security of which Men would now shew themselves ambitious, the Habeas Corpus Act, and in general all those laws which Subjects of every rank mention with love, and to which they look up for protection and safety, would be spoken of with contempt, and mentioned as remedies sit only for Countrymen and Cits:—it even would not be long before they were set aside, as obstructing the wise and salutary steps of the Senate.

The pretentions of an equality of right in all Subjects, of whatever rank and order, to their property

property and to personal safety, would soon be looked upon as an old fashioned doctrine, which the Judge himself would ridicule from the Bench. And the liberty of the press, now so universally and warmly vindicated, would without loss of time, be cried down and suppressed, as only serving to keep up the insolence and pride of a refractory people.

And let us not believe that the mistaken People, whose Representatives we now behold making such a firm stand against the indivisible power of the Crown, would, amidst the general devastation of every thing they hold dear, easily find Men equally disposed to repress the encroaching, while attainable, power of a Senate and Body of Nobles.

The time would be no more when the People, upon whatever Men they let their choice fall, are fure to find them ready fincerely to join in the fupport of every important branch of public liberty.

Prefent or expected, personal power and independence on the laws, being now the consequence of the trust of the People, wherever they should apply for servants, they would only meet with betrayers. Corrupting as it were every thing they should touch, they could confer no favour upon an individual but to destroy his pub-

lic virtue; and to repeat the words used in a former Chapter, "their raising a Man would "only be immediately inspiring him with views "directly opposite to their own, and sending him to increase the number of their enemies."

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All these considerations strongly point out the very great caution which is necessary to be used in the difficult business of laying new restraints on the governing authority. Let therefore the less informed part of the People, whose zeal requires to be kept up by visible objects, look if they choose upon the Crown as the only seat of the evils they are exposed to; mistaken notions on their part are less dangerous than political indifference, and they are more easily directed than roused,—but at the same time, let the more enlightened part of the Nation constantly remember, that the Constitution only subsists by virtue of a proper equilibrium,—by a line being drawn between Power and Liberty.

Made wise by the examples of several other Nations, by those which the History of this very Country affords, let the People in the heat of their struggles in the defence of liberty, always take heed, only to reach, never to overshoot, the mark,—only to repress, never to transfer and diffuse Power.

Amidst the alarms that may, at particular times, arise

arise from the really awful authority of the Crown, let it, on the one hand, be remembered, that even the power of the Tudors was opposed and subdued,-and on the other let it be looked upon as a fundamental maxim, that, whenever the profpect of personal power and independence on the governing authority, shall offer to the view of the Members of the Legislature, or in general of those Men to whom the People must trust, even Hope itself is destroyed. The Hollander, in the midst of a storm, though trusting to the experienced strength of the mounds that protect him, shudders no doubt at the fight of the foaming Element that furrounds him; but they all gave themselves over for lost, when they thought the worm had got into their dykes \*.

• Such new forms as may prove destructive of the real substance of a Government, may be unwarily adopted, in the same manner as the superstitious notions and practices described in my Work, intitled Memorials of Human Superstition, may be introduced into a Religion, so as to entirely subvert the true spirit of it.

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#### CHAP. XX.

A few additional Observations on the right of Taxation which is lodged in the hands of the Representatives of the People. What kind of danger this Right may be exposed to.

THE generality of Men, or at least of Politicians, seem to consider the right of taxing themselves, enjoyed by the English Nation, as being no more than a means of securing their property against the attempts of the Crown; while they overlook the nobler and more extensive efficiency of that privilege.

The right to grant subsidies to the Crown, posfessed by the People of England, is the safe-guard of all their other liberties, religious and civil: it is a regular means conferred on them by the Constitution, of influencing the motion of the Executive power: and it forms the tie by which the latter is bound to them. In short, this privilege is a sure pledge in their hands, that their Sovereign, who can dismiss their Representatives at his pleasure, will never entertain thoughts of ruling without the assistance of these.

If, through unforeseen events, the Crown could attain to be independent on the People

in regard to its supplies, such is the extent of its Prerogative, that from that moment, all the means the People possess to vindicate their liberty, would be annihilated. They would have no resource lest,—except indeed that uncertain and calamitous one, of an appeal to the sword; which is no more, after all, than what the most enslaved Nations enjoy.

Let us suppose, for instance, that abuses of power should be committed, which either by their immediate operation, or by the precedents they might establish, should undermine the liberty of the subject. The People, it will be faid, would then have their remedy in the Legislative power possessed by their Representatives. The latter would, at the first opportunity, interfere, and frame fuch Bills as would prevent the like abuses for the future. But here we must obferve, that the Affent of the Sovereign is necesfary to make those Bills become Laws: and if, as we have just now supposed, he had no need of the fupport of the Commons, how could they obtain his affent to laws thus purposely framed to abridge his authority?

Again, let us suppose that, instead of contenting itself with making slow advances to despotism, the Executive power, or its Ministers, should at once openly invade the liberty of the subject.

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Obnoxious men, Printers for instance, or political Writers, are destroyed, either by military violence, or, to do things with more fecurity, with the forms of law. Then, it will be faid, the Representatives of the People would impeach the persons concerned in those measures. unable to reach a King who perfonally can do no wrong, they at least would lay hold of those Men who were the immediate inftruments of his tyrannical proceedings, and endeavour, by bringing them to condign puunishment, to deter future Judges or Ministers from imitating them. Alf this I grant; and I will even add, that circumstanced as the Representatives of the People now are, and having to do with a Sovereign who can enjoy no dignity without their affiftance, it is most likely that their endeavours in the pursuits of fuch laudable objects would prove fuccessful. But if, on the contrary, the King, as we have fupposed, stood in no need of their affistance, and moreover knew that he should never want it, it is impossible to think that he would then suffer himself to remain a tame spectator of their proceedings. The impeachments thus brought by them would immediately prove the fignal of their dismission; and the King would make haste, by dissolving them, both to revenge what would

then be called the insolence of the Commons, and to secure his Ministers.

But even those are vain suppositions: the evil would reach much farther; and we may be assured that if ever the Crown was to be in a condition to govern without the assistance of the Representatives of the people, it would dismiss them for ever, and thus rid itself of an Assembly which, while it continued to be a clog on its power, would no longer be of any service to it. This Charles the First attempted to do when he found his Parliaments grew refractory, and the Kings of France really have done, with respect to the General Estates of their Kingdom.

And indeed if we consider the extent of the Prerogative of the King of England, and especially the circumstance of his completely uniting in himself all the executive and active powers in the State, we shall find that it is no exaggeration to say, that he has power sufficient to be as arbitrary as the Kings of France, were it not for the right of taxation, which, in England is possessed by the People; and the only constitutional difference between the French and English Nations is, that the former can neither confer benefits on their Sovereign, nor hinder his measures; while the latter, how extensive soever the Prerogative

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of their King may be, can deny him the means of exerting it.

But here a most important observation is to be made; and I entreat the reader's attention to the fubject. This right of granting fubfidies to the Crown, can only be effectual when it is exercised by one Affembly alone. When feveral diffinct Affemblies have it equally in their power to supply the wants of the Prince, the case becomes totally altered. The competition which fo eafily takes place between those different Bodies, and even the bare consciousness which each entertains of its inability to hinder the measures of the Sovereign, render it impossible for them to make any effectual constitutional use of their privilege. "Those different Parliaments or Estates (to " repeat the observation introduced in the former " part of this Work) having no means of recom-" mending themselves to their Sovereign, but " their fuperior readiness in complying with his " demands, vie with each other in granting what " it would not only be fruitless, but even dangerous to refuse. And the King, in the mean " time, foon comes to demand as a tribute, a " gift which he is confident to obtain." In short it may be laid down as a maxim, that when a Sovereign is made to depend, in regard to his Supplies, on more Assemblies than one, he in fact. depends

depends upon none. And indeed the King of France is not independent on his People for his necessary supplies, any otherwise than by drawing the same from several different Assemblies of their Representatives; the latter have in appearance a right to resuse all his demands: and as the English call the grants they make to their Kings, Aids or Subsidies, so do the Estates of the French provinces call their's Dons gratuits, or free gifts.

What is it, therefore, that constitutes the difference between the political fituation of the French and English Nations, since their rights thus feem outwardly to be the fame? The difference lies in this, that there has never been in England more than one Affembly that could fupply the wants of the Sovereign. This has always kept him in a state, not of a seeming, but of a real dependence on the Representatives of the People for his necessary supplies; and how low foever the liberty of the Subject may, at particular times, have funk, they have always found themselves possessed of a most effectual means of restoring it, whenever they have thought proper fo to do. Under Henry the Eighth, for instance, we find the Despotism of the Crown to have been carried to an aftonishing height: it was even enacted that the Proclamations of the King should have the force of law: a thing which even in

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France, never was so expressly declared: yet, no sooner did the Nation recover from its long state of supineness, than the exorbitant power of the Crown was reduced within its constitutional bounds.

To no other cause than the disadvantage of their situation, are we to ascribe the low condition in which the Deputies of the People in the Assembly called the General Estates of France, were always forced to remain.

Surrounded as they were by the particular Estates of those Provinces into which the Kingdom had been formerly divided, they never were able to stipulate conditions with their Sovereign; and instead of making their right of granting subsides to the Crown serve to gain them in the end a share in Legislation, they ever remained confined to the naked privilege of "humble Supplication and Remonstrance."

Those Estates, however, as all the great Lords in France were admitted into them, began at length to appear dangerous; and as the King could in the mean time do without their assistance, they were set aside. But several of the particular Estates of the Provinces are preserved to this day: some, which for temporary reasons had been abolished, have been restored: nay, so manageable have popular Assemblies been found

by the Crown, when it has to do with many, that the kind of Government we mention is that which it has been found most convenient to assign to Corsica: and Corsica has been made un pays d' Etats \*.

That

\* An idea of the manner in which the business of granting supplies to the Crown, was conducted by the States of the province of Britanny, under the reign of Lewis the Fourteenth, may be formed from feveral lively strokes to be met with in the Letters of Mad. de Sévigné, whose Estate lay in that Province, and who had often affifted at the holding of those States. The granting of supplies was not, it seems, looked upon as any ferious kind of bufinefs. The whole time the States were fitting, was a continued scene of festivity and entertainment: the canvaffing of the demands of the Crown was chiefly carried on at the table of the Nobleman who had been deputed from Court to hold the States; and every thing was commonly decided by a kind of acclamation. In a certain Assembly of those States, the Duke of Chaulnes, the Lord Deputy, had a present of fifty thousand crowns made to him, as well as a confiderable one for his Duchess, befides obtaining the demand of the Courts: and the Lady we quote here, commenting fomewhat jocularly on thefe grants, fays, Ce n'est pas que nous soyons riches; mais nous sommes bonnétes, nous avons du courage, & entre midi & une beure, nous ne savons rien refuser à nos amis. " It is not that we " are rich; but we are civil, we are full of courage, and, be-" tween twelve and one o'clock, we are unable to deny any " thing to our friends,"

The different Provinces of France, it may be observed, are liable to pay several taxes besides those imposed on them by K k 4 their

That the Crown in England should, on a sudden, render itself independent on the Commons for its supplies, that is, should on a sudden successfully assume to itself a right to lay taxes on the subject, by its own authority, is not certainly an event in any degree likely to take place, nor indeed that should, at this present time, raise any kind of political sear. But it is not equally impracticable that the right of the Representatives of the People might become invalidated, by being divided in the manner that has been just described.

Such a division of the right of the People might be effected several different ways. National calamities for instance, unfortunate foreign wars attended with loss of public credit, might suggest methods for raising the necessary supplies, different from those which have hitherto been used. Dividing the Kingdom into a certain number of parts, which should severally vote subsidies to the Crown, or even distinct affessments to be

their own States. Dean Tucker, in one of his Tracts, in which he has thought proper to quote this Work, had added to the above instance of the Frence Provinces, that of the States of the Austrain Netherlands, which is very conclusive. And examples to the same purpose might be supplied by all those Kingdoms of Europe in which Provincial States are held

made

made by the different Counties into which England is now divided, might, in the circumstances we suppose, be looked upon as adviseable expedients; and these being once introduced, might be continued afterwards.

Another division of the right of the People, much more likely to take place than those just mentioned, might be such as might arise from acquisitions of foreign dominions, the inhabitants of which should in time claim and obtain a right to treat directly with the Crown, and grant supplies to it, without the interference of the British Legislature.

Should any Colonies acquire the right we mention—should, for instance, the American Colonies have acquired it, as they claimed it, it is not to be doubted that the consequences that have resulted from a division like that we mention in most of the Kingdoms of Europe, would also have taken place in the British dominions, and that that spirit of competition which has been above described, would in time have manifested itself between the different Colonies. This desire of ingratiating themselves with the Crown, by means of the privilege of granting supplies to it, has even been openly consessed by an Agent of the American Provinces\*, when,

<sup>\*</sup> Doctor Franklin.

on his being examined by the House of Commons, in the year 1766, he said, "the granting "Aids to the Crown, is the only means the Americans have of recommending themselves to their Some vereign." And the events that have of late years taken place in America, render it evident that the Colonies would not have scrupled going any lengths to obtain favourable conditions at the expence of Britain and the British Legislature.

That a fimilar spirit of competition might be raised in Ireland, is also sufficiently plain from certain late events. And should the American Colonies have obtained their demands, and at the same time should Ireland and America have increased in wealth to a certain degree, the time might have come at which the Crown might have governed England with the supplies of Ireland and America—Ireland with the supplies of England and of the American Colonies—and the American Colonies with the money of each other, and of England and Ireland.

To this it may be objected, that the supplies granted by the Colonies, even though joined with those of Ireland, never could have risen to such a height as to have counterbalanced the importance of the English commons.—I an-

fwer,

fwer, in the first place, that there would have been no necessity that the aids granted by Ireland and America should have risen to an equality with those granted by the British Parliament: it would have been sufficient to produce the effects we mention, that they had only borne a certain proportion with these latter, so far as to have conferred on the Crown a certain degree of independence, and at the same time have raised in the English Commons a correspondent sense of felf-diffidence in the exercise of their undoubted privilege of granting, or rather refusing, subfidies to the Crown.—Here it must be remembered, that the right of granting, or refusing, fupplies to the Crown, is the only ultimate, forcible privilege the British Parliament posses: by the Constitution they have no other, as hath been observed in the beginning of this Chapter: this circumstance ought to be combined with the absolute exclusiveness of the executive powers lodged in the Crown-with its prerogative of diffenting from the Bills framed by Parliament, and even of diffolving it \*.

I shall

Being with Doctor Franklin at his house in Cravenfreet, some months before he went back to America, I mentioned to him a few of the remarks contained in this Chapter, and, in general, that the claim of the American Colonies directly clashed with one of the vital principles of the Enga

I shall mention in the second place, a remarkable fact in regard to the subject we are treating, (which may serve to shew that Politicians are not always consistent, or even sagacious in their arguments), which is, that the same persons who were the most strenuous advocates for granting to the American Colonies their demands, were at the same time the most sanguine in their pre-

English Constitution. The observation, I remember, struck him very much: it led him afterwards to speak to me of the examination he had undergone in the House of Commons; and he concluded with lending me the volume of the Collection of Parliamentary Debates, in which an account of it is contained. Finding the conflitutional tendency of the claim of the Americans to be a subject not very generally understood, I added a few paragraphs concerning it, in the English Edition I some time after gave of this work; and on publishing a third Edition of the same, I thought it might not be amiss to write something more compact on the Subject, and have accordingly added the present new Chapter, into which I have transferred the few additional paragraphs I mention, leaving in the place where they stood (pag. 45.) only the general observations on the right of granting fubfidies, which were formerly in the French work. Several of the ideas, and even expressions contained in this Chapter, made their appearance in the Public Advertiser, about the time I was preparing the first Edition: I fent them myself to that Newspaper, under the fignature of Advena. I mention this for the fake of those persons who may perchance remember having feen the sketch I alhide to.

dictions

dictions of the future wealth and greatness of America, and at the same time also, used to make frequent complaints on the undue influence which the Crown derives from the scanty supplies granted to it by the kingdom of Ireland.

Had the American Colonies fully obtained their demands, both the effence of the present English Government, and the condition of the English People, would certainly have been altered thereby: nor would such a change have been inconsiderable, but in proportion as the Colonies should have remained in a state of national poverty †.

CHAP.

\* For inflance, the complaints made in regard to the penfions on the Irish establishment.

† When I observe that no Man who wished for the prefervation of the form and spirit of the English Constitution, ought to have desired that the claim of the American Colonies might be granted them, neither do I mean to say that the American Colonies should have given up their claim. The wisdom of Ministers, in regard to American affairs, ought to have been constantly employed in making the Colonies useful to this Country, and at the same time in hiding their subjection from them (a caution which is, after all, more or less used in every Government upon earth; it ought to have been exerted in preventing the opposite interests of Britain, and of America, from being brought to an issue, to any such classing dilemma as would render disobedience on

#### CHAP. XXI.

Conclusion.—A few words on the nature of the Divisions that take place in England.

I Shall conclude this Work with a few observations on the total freedom from violence with which the political disputes and contentions in

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the one hand, and the refort to force on the other, almost furely unavoidable. The generality of people fancy that Ministers use a great depth of thought, and much forecast in their operations; whereas the truth is, that Ministers in all Countries, never think but of providing for present, immediate, contingencies; in doing which they conftantly follow the open track before them. This method does very well for the common course of human affairs, and even is the fafest; but whenever cases and circumstances of a new and unknown nature occur, fad blunders and uproar are the consequences. The celebrated Count Oxenstiern, Chancellor of Sweden, one day when his Son was expressing to him his diffidence of his own abilities, and the dread with which he thought of ever engaging in the management of public affairs, made the following Latin answer to him; Nescis mi fili, quam parva cum sapientia regitur mundus (You do not know, my fon, with what little Wisdom the World is governed.)

Matters having come to an eruption, it was no longer to be expected they could be compromifed by the palliative offers fent at different times from this Country to America.

When

England are conducted and terminated, in order both to give a farther proof of the foundness of the principles on which the English Government is founded, and to confute in general the opinion of foreign Writers or Politicians, who, misled by the apparent heat with which those disputes are sometimes carried on, and the clamour to which they give occasion, look upon England as a perpetual scene of civil broils and diffensions.

When the Earl of Carlisse solicited to be at the head of the folemn Commission that sailed for the purpose we mention, he did not certainly shew modesty equal to that of the Son of Chancellor Oxenstiern. It has been said that, in that stage of the contest, the Americans could not think that the proposals thus sent to them were seriously meant: however, this cannot have been the principal cause of the miscarriage of the commission. The sact is, that after the Americans had been once made to open their eyes on their political situation, and rendered sensible of the local advantages of their Country, it was become in a manner impossible to have struck with them any bargain at which either Nation would have afterwards cause to rejoice, or even to have any bargain at all. It would be needless to say here any thing more on the subject of the American contest.

The motto of one of the English Nobility, should have been that of Ministers, in their regulations for rendering the Colonies useful to the Mother Country,—Faire sans dire.

In fact, if we consider, in the first place, the constant tenor of the conduct of the Parliament, we shall see that whatever different views the several Branches that compose it may at times pursue, and whatever use they may accordingly make of their privileges, they never go, in regard to each other, beyond the terms, not only of decency, but even of that general good understanding which ought to prevail among them.

Thus the King, though he preserves the style of his Dignity, never addresses the two Houses but in terms of regard and affection; and if at any time he chuses to refuse their Bills, he only says that he will consider of them (le Roy s'advifera); which is certainly a gentler expression than the word Veto.

The two Houses on their part, though very jealous, each within their own walls, of the freedom of speech, are, on the other hand, careful that that liberty shall never break out into unguarded expressions with regard to the person of the King. It is even a constant rule amongst them never to mention him, when they mean to blame the administration; and those things which they may choose to censure, even in the Speeches made by the King in person, and which

which are plainly his own acts, are never considered but as the deed of his Ministers; or in general of those who have advised him;

The two Houses are also equally attentive to prevent every step that may be inconsistent with that respect which they mutually owe to one another: The examples of their differences with each other are very rare, and were for the most part mere misunderstandings. Nay, in order to prevent all subject of altercation, the cufrom is, that when one of the two Houses refuses to confent to a Bill presented by the other, no formal declaration is made of fuch refufal; and that House whose Bill is rejected, learns its fate only from their hearing no more of it, or by what the Members may be told as private perfons.

In each House, the members take care, even in the heat of debate, never to go beyond certain bounds in their manner of speaking of each other: if they were to offend in that respect, they would certainly incur the censure of the House. And as reason has taught Mankind to refrain, in their wars, from all injuries to each other that have no tendency to promote the main object of their contentions, fo a kind of Law of Nations (if I may so express myself) has been introduced among

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among the persons who form the Parliament and take a part in the debates: they have discovered that they may very well be of opposite parties, and yet not hate and persecute one another. Coming fresh from debates carried on even with considerable warmth, they meet without reluctance in the ordinary intercourse of life; and, suspending all hostilities, they hold every place out of Parliament to be neutral ground.

In regard to the generality of the People, as they never are called upon to come to a final decision with respect to any public measures, or expressly to concur in supporting them, they preserve themselves still more free from party spirit than their Representatives themselves fometimes are. Confidering, as we have obferved, the affairs of Government as only matter of speculation, they never have occasion to engage in any vehement contests among themselves on that account. Much less do they think of taking an active and violent part in the differences of particular factions, or the quarrels of private individuals. And those family feuds, those party animolities, those victories and consequent outrages of factions alternately successful; in fhort, all those inconveniences which in so many other States have constantly been the attendants

of liberty, and which Authors tell us we must submit to, as the price of it, are things in very great measure unknown in England.

But are not the English perpetually making complaints against the Administration? and do they not speak and write as if they were continually exposed to grievances of every kind?

Undoubtedly, I shall answer, in a Society of Beings subject to error, disflatisfactions will necessarily arise from some quarter or other; and in a free Society, they will be openly manisested by complaints. Besides, as every Man in England is permitted to give his opinion upon all subjects, and as, to watch over the admininistration, and to complain of grievances, is the proper duty of the Representatives of the People, complaints must necessarily be heard in such a Government, and even more frequently, and upon more subjects, than in any other.

But those complaints, it should be remembered, are not, in England, the cries of oppression forced at last to break its silence. They do not suppose hearts deeply wounded. Nay, I will go farther. They do not even suppose very determinate sentiments; and they are often nothing more than the first vent which Men give to their new, and yet unsettled conceptions.

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The agitation of men's minds is not therefore in England what it would be in other States: it is not the symptom of a profound and general discontent, and the forerunner of violent commotions. Foreseen, regulated, even hoped for by the Constitution, this agitation animates all the different parts of the State, and is to be considered only as the beneficial viciffitude of the seasons. The governing Power being dependent on the Nation, is often thwarted, but so long as it continues to deserve the affection of the People, can never be endangered. Like a vigorous Tree which stretches its branches far and wide, the flightest breath can put it in motion; but it acquires and exerts at every minute a new degree of force, and refifts the Winds, by the strength and elasticity of its fibres, and the depth of its roots.

In, a word, whatever Revolutions may at times happen among the persons who conduct the public affairs in England, they never occasion the shortest cessation of the power of the Laws, nor the smallest diminution of the security of individuals. A Man who should have incurred the enmity of the most powerful Men in the State—what do I say!—though he had, like another Vatinius, drawn upon himself the united detesta-

tion of all parties, might, under the protection of the Laws, and by keeping within the bounds required by them, continue to fet both his enemies and the whole Nation at defiance.

The limits prescribed to this book do not admit of entering into any farther particulars on the fubject we are treating here; but if we were to pursue this enquiry, and examine into the influence which the English Government has on the manners and customs of the People, perhaps we should find that, instead of inspiring them with any disposition to disorder or anarchy, it produces in them a quite contrary effect. As they fee the highest Powers in the State constantly submit to the Laws, and they receive, themselves, fuch a certain protection from those laws, whenever they appeal to them, it is imposible but they must insensibly contract a deep-rooted reverence for them, which can at no time cease to have fome influence on their actions. And, in fact, we see that even the lower class of the People, in England, notwithstanding the apparent excesses into which they are sometimes hurried, possess a spirit of justice and order, superior to what is to be observed in the same rank of Men in other Countries, The extraordinary indulgence which is shewn to accused persons of every degree, is not attended with any of those perni-

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cious consequences which we might at first be apt to sear from it. And it is perhaps to the nature of the English Constitution itself (however remote the cause may perhaps seem) and to the spirit of justice it continually and insensibly disfuses throughout all orders of the People, that we are to attribute the singular advantage possessed by the English Nation, of employing an incomparably milder mode of administering Justice in criminal matters than any other Nation, and at the same time of affording perhaps sewer instances of violence or cruelty.

Another consequence which we might observe here, as flowing also from the principles of the English Government, is the moderate behaviour of all those who are invested with any branch of public authority. And if we look at the conduct of all public Officers in England, from the Minister of State, or the Judge, down to the lowest officers of Justice, we find a spirit of forbearance and lenity prevailing in England, among all perfons in power, which cannot but create some surprize in those who have visited other Countries.

One circumstance more I shall observe here, as peculiar to England, which is the constant attention of the Legislature in providing for the interests and welfare of the people, and the indulgences

gences shewn by them to their very prejudices. Advantages these, which are no doubt the confequence of the general spirit which animates the whole English Government, but are also particularly owing to that circumstance peculiar to it, of having lodged the active part of Legislation in the hands of the Representatives of the Nation, and committed the care of alleviating the grievances of the People to persons who either feel them, or see them nearly, and whose surest path to advancement and glory is to be active in finding remedies for them.

Not that I mean, however, that no abuses take place in the English Government, and that all possible good laws are made in it, but that there is a constant tendency in it, both to correct the one, and improve the other. And that all the laws that are in being, are certainly executed, whenever appealed to, is what I look upon as the characteristic and undisputed advantage of the English Constitution. A Constitution the more likely to produce all the effects we have mentioned, and to procure in general the happiness of the People, in that it has taken Mankind as they are, and has not endeavoured to prevent every thing, but to regulate every thing: I shall add, the more difficult to discover, because its form was complicated, while its principles were natural

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and simple. Hence it is that the Politicians of Antiquity, sensible of the inconveniences of the Governments they had opportunities of knowing, wished for the establishment of such a Government, without much hopes of ever seeing it assected \*: nay, Tacitus, the best Judge of them all, considered it as a project entirely chimerical †. Nor was it because he had not thought of it, had not resected on it, that he was of this opinion: he had sought for such a government, had had a glimpse of it, and yet continued to pronounce it impracticable.

Let us not, therefore, ascribe to the confined views of Man, to his imperfect sagacity, the discovery of this important secret. The world might have grown old, generations might have succeeded generations, still seeking it in vain. It has been by a fortunate conjunction of circumstances, I shall add, by the assistance of a favourable situation, that Liberty has at last been able to erect herself a Temple.

Invoked by every Nation, but of too indelicate

<sup>&</sup>quot; Statuo esse optime constitutam Rempublicam quæ ex tribus generibus illis, regali, optimo, & populari, mo# dice consusa."—Cic. Fragm.

<sup>† &</sup>quot;Cunctas Nationes & Urbes, Populus, aut Priores aut Singuli, regunt. Delecta ex his & constituta Reipublica forma, laudari facilius quam evenire: vel si evenit, haud diuturna esse potest,"——Tac. Ann. lib, iv.

a nature, as it should seem, to subsist in Societies formed of such impersect beings as Mankind, she shewed, and but just shewed herself, to the ingenious Nations of antiquity who inhabited the south of Europe. They were constantly mistaken in the form of the worship they paid to her. As they continually aimed at extending dominion and conquest over other Nations, they were no less mistaken in the spirit of that worship; and though they continued for ages to pay their devotions to her, she still continued, with regard to them, to be the unknown Goddess.

Excluded fince that time, from those places to which she had seemed to give a preserence, driven to the extremity of the Western World, banished even out of the Continent, she has taken refuge in the Atlantic Ocean. There it is, that, freed from the danger of external disturbance, and affisted by a happy pre-arrangement of things, she has been fully able to display the form that suited her; and she has found six centuries to have been necessary to the completion of her Work.

Being sheltered, as it were, within a Citadel, she there reigns over a Nation which is the better entitled to her favours as it endeavours to extend her Empire, and carries with it, to every part of its dominions, the blessings of industry and equality. Fenced in on every side, to use

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the expressions of Chambelayne, with a wide and deep ditch, the fea guarded with ftrong outworks, its ships of war, and defended by the courage of her Seamen, she preserves that important fecret, that facred fire fo difficult to be kindled. and which, if it were once extinguished, would perhaps never be lighted again. When the World shall have been again laid waste by Conquerors, she will still continue to shew Mankind, not only the principle that ought to unite them, but, what is of no less importance, the form under which they ought to be united. And the Philosopher, when he considers the constant fate of civil Societies amongst Men, and observes the numerous and powerful causes which seem as it were unavoidably to conduct them all to a flate of incurable political Slavery, takes comfort in feeing that Liberty has at length disclosed her fecret to Mankind, and fecured an Afylum to herfelf.



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